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IN THE

Supreme Court of the United States

October Term, 1965

No. 967

PUROLATOR PRODUCTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Purolator Products, Inc. ("Purolator"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on October 22, 1965.

Opinions Below

The initial decision of the Federal Trade Commission's ("FTC") hearing examiner is unreported and appears in the Joint Appendix at R. 22-37.[1] The opinion of FTC

1. References to R. shall mean the stated page in the Joint Appendix, nine copies of which have been filed by Purolator for this Court's use. References to CX shall mean FTC's Exhibits and references to RX shall mean Respondent's (Purolator's) Exhibits printed in the Joint Appendix.

together with Commissioner Elman's dissenting opinion, is unofficially reported in CCH 1963-1965 Trade Reg. Rep. Transfer Binder Para. 16,877 and also appears at R. 39-77. The opinion of the court of appeals, printed in Appendix B hereto, *infra*, p. 2a *et seq.*, is unofficially reported in 1965 Trade Cases 71,576 (7th Cir. 1965).

Jurisdiction

The judgment of the court of appeals (Appendix C, *infra* (printed) pp. 23a-24a) was entered on October 22, 1965 and the final decree enforcing the order to cease and desist was filed in the court of appeals on November 15, 1965 (Appendix D, *infra* (printed) pp. 25a-26a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a seller who makes a payment to a customer for performing a specified distributive function may defend a charge under §2(a)[2] that he has unlawfully discriminated in price against a customer not performing that function (and not receiving the payment) by showing that competition could not be injured because the payment was more than consumed in the cost of performing the function, leaving nothing with which to injure competition.

2. Whether FTC's mechanical formula approach to the admission and evaluation of evidence relating to competitive injury has had the effect of eliminating the competitive injury requirement of §2(a) and converting it into a price control statute contrary to the Sherman Act's philosophy of price competition and price freedom.

2. §2(a) of the Clayton Act, as amended, 15 U.S.C. §13(a), sometimes referred to as "§2(a)".

3. Whether the fair hearing requirement of the due process clause of the Fifth Amendment to the Federal Constitution was violated when FTC's evidence of customers' costs was accepted as relevant to prove competitive injury under §2(a) but Purolator's evidence of customers' costs was rejected as irrelevant to *dis*prove such competitive injury.

4. Whether a reviewing court may substitute its judgment for FTC's in a matter of pure law as distinguished from a mixed question of law and fact.

5. Whether there is any legal basis in §2(a) or its legislative history for FTC's interpretation that one who purchases not from the seller but from a customer of the seller can be deemed an "indirect" purchaser from such seller.[3]

6. Whether a seller under §2(a) may cost justify a price difference between his own (direct) purchasers and so-called "indirect" purchasers on the basis of the cost he incurred in paying his own (direct) purchasers for acting as his intermediaries or agents in distributing his product to the indirect purchasers.

Statute Involved

The statutory provision involved is §2(a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936); 15 U.S.C. §13(a). It is printed in Appendix A, *infra*, p. 1a.

3. Purolator directs this Court's attention to the second question presented for review in Monroe Auto Equipment Company's Petition for Certiorari, *Monroe Auto Equipment Company* v. *FTC*, Docket No. 565 (October Term, 1965). Since a determination of this question No. 2 assumes the validity of FTC's indirect purchaser interpretation of §2(a), Purolator respectfully asks this Court to note that Purolator is challenging the validity of this interpretation.

Statement

This petition seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed an order of FTC directing Purolator to cease and desist from violating §2(a).

Proceedings Below

On March 29, 1960, FTC issued its complaint charging Purolator with alleged price discriminations in violation of §2(a)(R. 1-6). Purolator filed an answer (R. 7-9) and an amended answer (R. 20-21) denying such allegations. FTC called no witnesses. Its case-in-chief consisted entirely of a stipulation of what hypothetical witnesses would testify plus certain exhibits (R. 95-128, 824-938). Purolator's case consisted of many witnesses and exhibits. FTC's hearing examiner issued his initial decision against Purolator on November 27, 1962. Purolator appealed to FTC. A majority of 2 (out of 3 Commissioners) held against Purolator on all issues. Their opinion was entered on April 3, 1964 together with the dissenting opinion of Commissioner Elman (R. 39-77). Pursuant to §11(c) and (d) of the Clayton Act, 15 U.S.C. §21(c) and (d), Purolator on June 26, 1964 petitioned the Court of Appeals for the Seventh Circuit to review FTC's order (R. 77-93) and on October 22, 1965 the court of appeals affirmed such order (Appendix B, pp. 2a-22a).

Background Facts

Purolator manufactures automotive replacement filters for filtering oil, air and gasoline in automobiles, trucks and buses ("Filters") and sells them nationwide to independent warehouse distributors ("WDs") (R. 100). Such WDs resell mostly to jobbers but sometimes also to fleets and to dealers (garages, service stations, etc.). Jobbers

resell mostly to dealers and sometimes to fleets. Dealers resell to the consumer (auto owner). Purolator does not itself sell to jobbers, fleets, dealers or consumers, but only to WDs (R. 100).

Some WDs are affiliated with (i.e., own or control or are owned or controlled by) some or all of the jobbers[4] to whom they sell (R. 103; also see, e.g., R. 364-365). Most WDs with jobber affiliates internally redistribute or "double handle"[5] Filters from the WD's warehouse through the affiliated jobber's warehouse (R. 494, 520, 573, 715), although some do not, and in such cases the affiliated jobbers buy directly from Purolator (R. 358-359, 413, 594). Affiliated jobbers sell mainly to dealers, but sometimes also sell to other (independent) jobbers (e.g., R. 697).

Price Structure

Purolator's price structure is adequately described both textually and graphically in the court of appeals' opinion at Appendix B, pp. 5a-7a. For purposes of this petition the following are relevant:

1. Like automotive parts manufacturers generally, Purolator's price structure was based on a suggested list price to the consumer (auto owner). Its base discounts to WDs prior to February 1, 1958 were 60% and 9% off

4. FTC counsel made much of the fact that affiliated jobbers are referred to in the stipulation of FTC's case-in-chief as "branches" or "branch locations". Regardless of terminology, however, they performed generally the functions of a jobber.

5. The term "double handling" means essentially that two physically separate but affiliated warehouses, i.e., the WD's central warehouse and the warehouse of the affiliated jobber, handle goods successively. "Internal redistribution" means distribution between such two affiliated warehouses and is used interchangeably with "double handling" (R. 107). "External redistribution" means distribution by a WD to an unaffiliated (independent) jobber (R. 105).

the consumer list, making a base price to the WD of 36.4¢,[6] and Purolator gave an additional 11% (4.4¢) external redistribution discount as compensation to the WD for redistributing to jobbers (R. 103, 104, 126, 851). These discounts were the same as Fram Corporation's ("Fram") and substantially the same as AC Spark Plug Division's ("AC") of General Motors Corporation, Purolator's major competitors (R. 140). On February 1, 1958, Purolator ceased to be a price follower and broke with this traditional price structure (R. 139-140). It raised its price to WDs by lowering its base discount to 60% and 5%, making its base price to the WD 38¢; increased its compensation for redistribution to independent jobbers by making its external redistribution discount 15% (6¢); and created a new discount of 4%[7] (1.6¢) for internally redistributing to affiliated jobbers (R. 103-104, 107). Neither AC nor Fram followed. Purolator's pricing innovation—the 4% internal redistribution discount—was attacked and held unlawfully discriminatory by FTC because WDs (without affiliated jobbers) reselling to dealers received only the basic discounts of 60% and 5%, making Purolator's price to them 38¢ (R. 103) while WDs who internally redistributed to affiliated jobbers, who in turn resold to dealers, received in addition, the 4% (1.6¢) internal redistribution discount, making Purolator's price to them 36.4¢ (A. 107).

2. Purolator suggested that WDs resell to their jobber customers at 60% off the suggested consumer list price, making a suggested resale price to jobbers of 40¢ (R. 103).

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6. Based upon a Filter with a hypothetical suggested consumer list price of $1.00.

7. The 60% was deducted from the ($1.00) suggested consumer list price. All other discounts were deducted from the (40¢) remainder.

Therefore, there was a price difference between WDs and jobbers of 5% (2¢) when WDs resold directly to dealers or 5% plus 4% (3.6¢) when WDs double handled through an affiliated jobber which resold to dealers. These differences were held illegally discriminatory on the ground that the jobbers were "indirect" purchasers from Purolator.

3. The court of appeals approved FTC's holding that WDs were Purolator's intermediaries or agents and that jobbers were Purolator's indirect purchasers. However, it rejected Purolator's defense that since it had to pay as compensation 15% (6¢)[8] more to sell and deliver to its indirect jobber purchasers through such WD-intermediaries than when it sold and delivered to WD purchasers (for resale to dealers), the price differences described in paragraph 2 above were justified under the cost proviso of §2(a) which reads:

> "Provided, that nothing herein contained shall prevent differences in the cost of * * *, sale, or delivery resulting from the *differing methods* * * * in which such commodities are to such purchasers *sold or delivered* * * *." (Emphasis added.)

Competitive Injury

FTC's evidence of the requisite competitive injury (as pertinent to this petition) consisted entirely of a subparagraph [designated "E(5)"] of its stipulated case-in-chief to the effect that witnesses, if called, would testify that there was competition between WDs and jobbers reselling to dealers, and between WDs who double handled and WDs who did not double handle (R. 101-102), in the resale of Filters and that

> "(5) Automotive parts wholesaling, whether at the warehouse distributor or jobber level, or

8. The external redistribution payment was made by Purolator to WDs expressly for performing the function of selling and delivering to jobbers.

> across such levels (i.e., where the warehouse distributor competes with the jobber for sales to dealers and fleets), is a keenly competitive business. It is also a business of relatively high costs, at all levels just mentioned. As a direct result of such high operating costs, net profit margins typical of the business range between 3% and 4% (after taxes, which are generally considered a cost of doing business). With such net profit margins, both the warehouse distributor's and jobber's profitability is extremely sensitive to the cost of product acquisition. Consequently, the 2% cash discount, which is offered by respondent [Purolator] and most other suppliers of automotive replacement parts is uniformly taken, whenever possible and is considered by warehouse distributors and jobbers alike to be important, and sometimes essential, to a profitable business." (R. 123-124.)

From E(5) FTC automatically concluded that since Purolator's 4% internal redistribution discount was mathematically greater than the 2% cash discount, it would have the requisite probability of competitive injury. On this evidence, *and on this evidence alone,* the FTC majority and the court of appeals based their condemnation of Purolator's 4%.

Purolator contended, on the other hand, that a discount is important to profitability of a WD's business only to the extent that it represents a *net* "saving or advantage"[9] and that the net saving or advantage is not the gross amount of the discount but the *net* amount after deducting the WD's cost of obtaining it.

Purolator's evidence to disprove competitive injury showed that the cost to a WD for double handling Filters from his main warehouse to the physically separate affili-

9. *Whitaker Cable Corporation,* 51 F.T.C. 958, 965 (1955).

ated jobber warehouse exceeded 4% in all cases and that the 4% discount, accordingly, provided no saving or advantage to the WD receiving it. Thus, he received nothing which would increase his margin of profit or permit him to extend additional services to customers, use additional salesmen, carry larger or more varied stocks or establish additional branch houses.[10]

Purolator showed that the 4% discount was openly offered to all WD purchasers; that a WD did not have to purchase any particular quantity or volume of Filters to qualify; that the discount was not designed for, or received by, just large WDs but by medium and small sized ones as well, and that neither large, medium nor small nonaffiliated WDs experienced (nor could they conceivably experience) any difficulty in competing with WD-recipients of the 4%. The court of appeals in upholding FTC, however, rejected as irrelevant all of Purolator's evidence to disprove competitive injury.

Reasons For Granting The Writ

1. In Deciding That Buyers' Costs Are Irrelevant To The §2(a) Issue Of Competitive Injury, The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no court case other than this proceeding, and no decision by this Court, which squarely raises the important question whether evidence of buyers' cost of performing a distributive function can be used to rebut an alleged prima facie showing of com-

10. These uses of a *net* saving or advantage flowing from a discriminatory discount have been held to be factors which typically cause such discount to have the requisite tendency to injure competition. *Whitaker Cable Corporation*, 51 F.T.C. 958 at 965 (1955).

petitive injury flowing from a discount granted for performing that function. However, Professor Corwin Edwards, former chief economist of the Federal Trade Commission, thought such evidence relevant when he said:

> "It is interesting to note that differences in the costs incurred by different classes of buyers were not considered in any of the [FTC] cases. Such differences could not have been used in direct justification of price differences, since the law makes the cost defense available only where the price concession is justified by an appropriate difference in the seller's cost. *However, where functional discounts were based on differences in the activities or services performed by buyers, the effect of these differences on buyers' costs appears to be directly relevant to the question whether or not the discounts were injurious.* In the Standard Oil case, for example, it is obvious that the four concerns receiving the jobbers' discount performed functions, such as the bulk storage of gasoline, that were not performed by the ordinary filling-station operator. If these additional functions had cost the big buyers as much as 1.5 cents per gallon, the discount granted by Standard would have had no effect in reducing the net cost of the gasoline sold at retail by the large buyers. An extra 1.5 cents in the price paid by some customers would have been equivalent to an extra 1.5 cents in the cost incurred by other customers. *Thus, a full exploration of the likelihood of injury through price difference appears to necessitate a consideration of the question of the cost differences among customers that are systematically related to the price difference.* Though such costs are not explicitly covered by the Commission's findings, what is said as to injury appears to rest on a presumption that the extra services performed by favored

> classes of distributors required no substantial extra expenditures. Apparently, this presumption was not vigorously challenged in any of the functional discount cases that were tried."[11] (Emphasis added.)

Frederick M. Rowe, one of the leading authorities on the Robinson-Patman Act, is of the opinion that buyers' costs are relevant to the question of competitive injury:

> "The statutory requirement that any competitive injury must be the 'effect of' the challenged price differential *should* absolve a price quotation of adverse competitive effects to the extent the nominal differential in favor of one buyer or customer class is neutralized by the added costs or functions assumed by the 'favored' customer as a concomitant of receiving the lower price."[12]

In a paper delivered to the Antitrust Law Section of the New York State Bar Association in January 1961, the then Chairman of FTC, Earl W. Kintner, in discussing important complaints issued by FTC in 1960, said:

> "A number of other significant 2(a) complaints were issued in calendar 1960. Among these were Purolator Products, Inc. (D. 7850). This case may produce significant future refinements of the law dealing with the right of a respondent to base a defense of a 2(a) charge on evidence of its buyer's costs. Although prior cases have made it reasonably clear that the buyer's costs cannot be used to

11. Edwards, *The Price Discrimination Law,* 316-317 (Brookings Institution, 1959).

12. Rowe, *Price Discrimination under the Robinson-Patman Act,* 188 (Little, Brown and Company, 1962). See also, Patman, *Complete Guide to the Robinson-Patman Act,* 55 (Prentice-Hall Inc., 1963) and *Report of the Attorney General's National Committee to Study the Antitrust Laws,* 207 (1955).

> form a cost justification defense, *this case poses the question whether the buyer's costs can be used to show a lack of competitive injury.*" (Emphasis added.)[13]

FTC, however, (with Mr. Kintner no longer a member), elected not to inquire into this matter, but to presume irrebuttably that any discount which is mathematically greater than the cash discount *will* have the requisite probability of adverse competitive effects regardless of the functional costs incurred by the buyer in qualifying for the discount and notwithstanding that the discount will be dissipated by such costs. The court of appeals below has upheld FTC's sweeping rejection of buyers' costs as a defense.

As already indicated, Purolator's 4% discount was not confined to large WDs but was indiscriminate in its availability even to the "Mom and Pop" WD with one small warehouse and one even smaller affiliated jobber (e.g., R. 517-518, 888). The discount had neither the purpose nor effect of providing benefits to bigness as such, and as FTC Commissioner Elman said in his dissenting opinion (R. 77):

> "• • • where, as in this case, differences in price exist as part of a complex and delicately-poised pricing system which is the result of normal competitive forces and *not of simple discrimination coerced by powerful buyers,* the Commission should avoid automatic assumptions of competitive injury • • •." (Emphasis added.)

13. Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* CCH 1961 Antitrust Law Symposium, 30.

2. The Court Of Appeals' Opinion With Respect To The §2(a) Competitive Injury Issue Is Inconsistent With Principles Laid Down By This Court With Respect To The Reconciliation Of The Conflicting Policies Of The Sherman And Robinson-Patman Acts.

By sanctioning FTC's "mechanical formula" approach to competitive injury, i.e., its automatic and irrebuttable presumption that any discount in excess of the cash discount will have the requisite competitive effect even though the discount does not constitute a net saving or advantage because dissipated by the cost of performing the distributive function for which granted, the court has decided a federal question in conflict with principles laid down by this Court in *Automatic Canteen Company* v. *FTC,* 346 U. S. 61 (1953) and *FTC* v. *Sun Oil Co.,* 371 U. S. 505 (1963).

FTC's and the court of appeals' extreme interpretation has converted §2(a) into a price control law contrary to its manifest purpose and has made it inconsistent with this Court's opinion in *Automatic Canteen* to the effect that the Robinson-Patman Act must be construed in the light of the Sherman Act's overriding policy against unreasonable restraints on price competition 346 U. S. at 74.

Furthermore, in *Sun Oil* this Court said:

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."

FTC's "mechanical formula" approach to competitive injury effectively forestalls functional pricing innovations

such as Purolator's 4% internal redistribution discount and restricts functional pricing patterns to those approved by FTC. Such "push button" enforcement is an abdication of FTC's so-called expertise and of its duty to examine into economic realities.

3. The Fair Hearing Requirement Of The Due Process Clause Of The Fifth Amendment To The Federal Constitution Was Violated When FTC's Evidence Of Customers' Costs Was Held Relevant To Prove Competitive Injury Under §2(a) But Purolator's Evidence of Customers' Costs Was Held Irrelevant To Disprove Such Competitive Injury.

FTC and the court of appeals held that evidence of industry-wide cost averages, indicating that wholesalers of automotive parts allegedly operated on small profit margins in a highly competitive industry, was relevant to show that Purolator's 4% discount could injure competition. However, FTC and the court held irrelevant Purolator's evidence of individual customer costs showing that the 4% discount was more than consumed in the costs of performing the distributive function for which it was paid. This, Purolator respectfully submits, violated the fair hearing requirement of the due process clause of the Fifth Amendment to the Constitution of the United States.[14]

In *Donnelly Garment Co.* v. *NLRB,* 123 F. 2d 215, 222, 224 (8th Cir. 1941)[15], an NLRB trial examiner accepted testimony of Board witnesses tending to prove that an employer interfered with or supported the organization of an independent union and rejected testimony offered by

14. See also Administrative Procedure Act, 5 U.S.C. §1006(c) (1950).

15. See also *Wheeler* v. *NLRB,* 314 F. 2d 260, 263 (D. C. Cir. 1963).

the employer tending to disprove such domination and support. The Eighth Circuit held that since the Board's evidence was relevant to a material issue in the case, the employer's evidence bearing on the same issue was equally relevant, saying:

> "That a refusal by an administration agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate." 123 F. 2d at 224. See also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 487-488 (1951).

Evidence of customers' costs is either relevant or irrelevant under §2 (a) to the issue of competitive injury. If relevant for FTC, it is relevant for Purolator. If irrelevant for Purolator, it is irrelevant for FTC.

4. The Court Of Appeals By Refusing To Reverse FTC's Indirect Purchaser Theory Has Misapplied This Court's Decisions And Has Added To The Confusion Of The Legal Profession As To What Matters Are Proper For Court Review.

Purolator asked the court of appeals to decide whether there is any legal basis for FTC's indirect purchaser interpretation of §2(a). In answering this question, the court did not have to determine the *application* of §2(a), *i.e.*, to decide a mixed question of law and fact. In presenting the question, Purolator in effect asked the court to assume *arguendo* that all factors which FTC had ever considered pertinent to a holding of indirect purchaser were present. Therefore, the question was one that had to be decided

solely by reference to legislative history and other methods of statutory interpretation.

However, the court of appeals in answering the question, erroneously assumed that it was a mixed question of law and fact and cited three opinions of this Court [16] which relate to the proper scope of court review of mixed questions. The *Hearst, Gray,* and *Drum* decisions hold that when mixed questions of law and fact arise, this Court will accept an administrative agency's application of a statute if the application has a "'warrant in the record' and a reasonable basis in the law." 322 U. S. at 131.

In matters of pure law, however, this Court has held that courts reviewing administrative agency decisions may substitute the court's judgment for the administrative agency's judgment. See *Automatic Canteen Co. v. FTC,* 346 U. S. 61, 74 (1953); *FTC* v. *Anheuser-Busch,* 363 U. S. 536 (1960) and *NLRB* v. *Insurance Agents' International Union, AFL-CIO,* 361 U. S. 477, 488 (1960).

Justice Frankfurter in his dissent in *FTC* v. *Motion Picture Advertising Service Co. Inc.,* 344 U. S. 392, 404-405 (1953) stated that substituted judgment should be made more readily in FTC cases than, for example, in Interstate Commerce Commission cases, because FTC unlike the Interstate Commerce Commission has authority over restrictions upon "the whole domain of economic enterprises engaged in interstate commerce." 392 U. S. at 405. Although Justice Frankfurter was discussing the Federal Trade Commission Act, his statements seem equally applicable to the Robinson-Patman Act, a statute of equal breadth.

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16. *Board* v. *Hearst Publications,* 322 U. S. 111, 131 (1944); *Gray* v. *Powell,* 314 U. S. 402, 411 (1941), and *United States* v. *Drum,* 368 U. S. 370, 375-376 (1962).

A reading of §2(a) and the legislative history will permit this Court to substitute its judgment for that of the FTC as the court of appeals should have done. The importance of clarifying this issue now cannot be overstated, since the Federal bar is confused as to the proper scope of court review.

5. In Deciding That FTC's Indirect Purchaser Interpretation Of §2(a) Is Valid, The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no decision of this Court on the validity of FTC's indirect purchaser interpretation of §2(a). In fact, Purolator knows of no case in any court in which the validity of FTC's interpretation was ever challenged, briefed or argued until this proceeding.

Legislative History of §2(a) Shows No Legal Basis for FTC's Indirect Purchaser Interpretation.[17]

There is nothing in the language of §2(a) or any other section of the Act indicating that the terms "purchasers", "purchases", "sold" and "resale" have meanings different from those commonly understood in sales transactions. The adverbs "directly" or "indirectly" in §2(a), of course, modify "discriminate" not "purchasers". During the hearings of the House Judiciary Committee on the Patman Bill (H. R. 8442), the following exchange occurred between Representative Lloyd (Nebraska) and Mr. H. B. Teegarden, the drafter of the Bill:

> "Mr. Lloyd: It is a common practice in my county for large concerns to buy at wholesale and

17. It is to be observed from FTC's brief (pp. 14-16) to this Court in *FTC* v. *The Borden Company*, Docket No. 106, (October Term, 1965), that when FTC believes the legislative history relating to §2(a) will further its statutory views, it will cite such history in *extenso*. But when, as here, the legislative history is contrary to its statutory views, then it chooses to ignore the legislative history.

> maintain large stock and, at the same time, maintain a retail department. * * *
>
> "Manifestly, the price charged by that concern to the independent retailer * * * is greater than the price that it charges itself for its own retail business. How will this bill affect that situation * * *?
>
> * * * * * *
>
> "Mr. Teegarden: There would be no question of discrimination presented. * * *"
>
> "Mr. Lloyd: I wonder why."
>
> "Mr. Teegarden: *Because it is not a sale to itself. This only covers discriminations in sales. Consequently, unless there is a sale on both sides, there can be no discrimination.*" Hearings before the House Committee on the Judiciary, 74th Cong. 1st Sess. ser. 10, pt. 1, at 211 (1935). (Emphasis added.)

At another point, Mr. Lloyd mentioned a gasoline company making a book transfer of gasoline to its own service stations, and observed that "by book transaction, they avoided the *sale* contemplated in your act." Mr. Teegarden agreed, stating, "So long as we are dealing with the question of discrimination between *purchasers,* I do not believe it would be possible to deal with an evil arising from another situation." House Hearings, *supra,* at 229 (emphasis added). Mr. Lloyd then suggested, "Unless you go further and define a purchaser." But Mr. Teegarden replied (House Hearings, *supra,* at 229-30):

> "Well, that might be done. Although personally, from the standpoint of sound legislation, I should prefer to reach it by another bill, in a more direct way, rather than define purchaser for the purpose of this act to mean something that it does not mean *in ordinary parlance.*" (Emphasis added.)

The report of the House Committee on the Bill contained the following statement:

> "When retailers acting cooperatively in their purchasing activities will be classified as wholesalers or retailers will depend naturally upon whether their cooperative organization functions as a separate entity *taking title and reselling* it to its retailer members, or merely as representing them severally in their dealings direct with the selling source of supply * * *" H.R. Rep. 2287, 74th Cong. 2d Sess. at 9 (1936) [quoted in Patman, *The Robinson-Patman Act*, 301 (1938)]. (Emphasis added.)

While this statement concerned a purchaser classification clause, deleted before passage of the Act, it shows that Congress recognized that a sale could occur only if title passed from seller to purchaser.

6. The Court Of Appeals By Deciding That Compensation Paid By A Seller To His Agents For Distributing To "Indirect Customers" Cannot Be Used For Cost Justification Purposes Under §2(a), Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Purolator knows of no decision of this Court squarely determining the applicability of the cost justification proviso of §2(a) to the cost incurred in compensating an agent for selling to an "indirect customer."

The court of appeals, like FTC, erred in rejecting the defense Purolator interposed under the cost justification proviso of §2(a). Purolator sold to its WD purchasers (when they resold to dealers) at a price of 38¢, or 36.4¢ if the WD internally redistributed. Under FTC's own

interpretation of §2(a), Purolator sold to its alleged jobber purchasers (who resold to dealers) at 40¢ by a differing method of sale and delivery, namely, through the WD *acting as an agent*. As a result of this differing method of sale and delivery to its alleged jobber purchasers, Purolator incurred a measurable cost of 6¢ more than when it sold to its WDs *as purchasers* (for resale to dealers), i.e., it paid the WDs *as agents* 6¢ (the 15% external redistribution discount) for performing the services of warehousing, promoting, selling, shipping, invoicing and collecting.[18] This cost savings of 6¢ more than offset the maximum price difference of 3.6¢. The question squarely presented to the court of appeals was whether this 6¢ compensation was a "cost" within the meaning of the cost justification proviso to §2(a).

Conflict with Principles of Broch and Thomasville Chair Decisions

The court of appeals, in effect, said that this monetary outlay was not a "cost" but merely a "price". Its holding in this regard is in conflict with the principles set forth in *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 173-174 (1960) and *Thomasville Chair Company* v. *FTC*, 306 F. 2d 541, 544-545 (5th Cir. 1962). The *Broch* case indicates that a reduction or elimination of brokerage costs might well justify a valid reduction in price by a seller to a particular buyer. Such justification would, of course, be possible only by regarding brokerage as a cost. In

18. The WD, in other words, had two different legal relationships with Purolator. On sales by Purolator to the WD for resale to dealers, the WD was a purchaser. On sales by Purolator through the WD to jobbers, however, the WD was an agent and the 6¢ was the agent's compensation.

Thomasville Chair the 5th Circuit held, in effect, that a lower price to one class of customers can be cost justified by lower salesmen's commissions paid for sales to that class.

If salesmen's and brokerage commissions are "costs" under the §2(a) proviso, the 6¢ compensation paid by Purolator to WDs as agents for selling and delivering to jobbers was equally a "cost". There is no reason why a WD who happens to be Purolator's *customer* when he resells to dealers cannot be compensated as Purolator's *agent* in selling and delivering to jobbers. FTC's decision, affirmed by the courts of appeals, that jobbers were indirect purchasers from Purolator rested inescapably on FTC's finding that the WD, although nominally taking title to the Filters and selling and delivering them to jobbers, had become, by virtue of Purolator's alleged control over him, a mere agent. As stated in the Commission's opinion (R. 59):

> "The relevant issue is whether respondent [Purolator] so limited or controlled the activity of the warehouse distributor in relation to the jobber that the jobber became respondent's customer and *the warehouse distributor became virtually respondent's agent in handling the sale.*"

Since the WD was held to be an agent in redistributing to jobbers, the money paid him for such redistribution (whether denominated a commission, brokerage, compensation, allowance or discount) was necessarily *one of Purolator's costs of selling and delivering to such jobbers.* Under *Thomasville Chair* and *Broch,* this cost should have been recognized for purposes of the cost justification proviso to §2(a).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SUMNER S. KITTELLE, Esq.,
ALLAN TRUMBULL, Esq.,
Counsel for Petitioner.

January 19, 1966

Appendix A

Section 2(a) of the Clayton Act, as Amended by the Robinson-Patman Act

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

Appendix B

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14704

PUROLATOR PRODUCTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

OCTOBER 22, 1965

Before HASTINGS, *Chief Judge,* and KNOCH and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* On petition of Purolator Products, Inc., we have for review a cease and desist order issued by Federal Trade Commission following an administrative proceeding upon a complaint charging Purolator with violating Section 2(a) of the Clayton Act, as amended.[1]

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[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved

The complaint charged that Purolator's distribution system and its prices and discounts resulted in unlawful price discrimination. The charges relate only to the sale of Purolator's automotive replacement filters. These filters are sold as replacements for worn original equipment on automobiles, trucks and other motor vehicles in what is known as the "after market" or "replacement market."

In 1957, Purolator's business in this market exceeded $5,000,000 and its present share of the market is about 32%. It is in national competition with leading members of the automotive industry and regionally with numerous other concerns.

After a full hearing, the hearing examiner found against Purolator and issued his initial decision, including an order to cease and desist. Commission adopted the order entered by the examiner, after some modification of the initial decision. Commissioner Elman did not concur and filed a separate opinion.

The parties entered into an extended stipulation of facts and exhibits incorporated therein. Commission rested its case on the stipulation. Purolator presented testimony and documentary exhibits in support of its defense. In finding a violation of the Act, Commission relied principally on the stipulated record.

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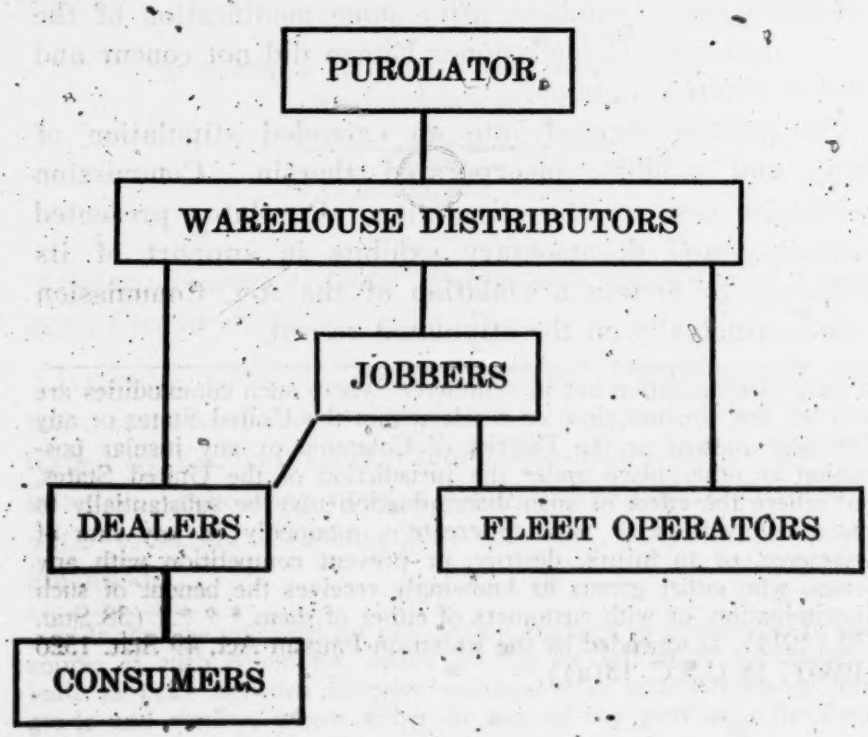
in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." (38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936); 15 U.S.C. 13(a)).

The factual background of this case is rather complicated. We find little dispute concerning the following statement.

PUROLATOR'S DISTRIBUTION SYSTEM

Purolator manufactures and sells its automotive replacement filters throughout the country. These are sold directly and only to independent warehouse distributors (WDs). WDs resell the filters to jobbers, fleet operators and to dealers (garages, service stations, etc.). Jobbers resell to dealers and fleet operators. Dealers resell to the consumer (the car owner). Fleet operators do not resell, but use the filters in their fleets (taxicabs, etc.). Purolator itself does not sell directly to jobbers, fleets, dealers or consumers. The channels of distribution may be shown as follows:



Some jobbers are affiliated with (i.e., own or control or are owned or controlled by) WDs, although they may be separate corporate entities. Most WDs with affiliated jobbers also sell to unaffiliated (independent) jobbers. Non-affiliated jobbers and independent WDs are in direct competition with WDs having affiliated jobbers.

Finally, some WDs with affiliated jobbers receive the replacement filters at a central warehouse and later reship them to their affiliates, while other WDs with affiliates have Purolator send the filters directly to their affiliated jobbers. Thus, distribution by WDs through their affiliates is in reality internal redistribution or double handling.

PUROLATOR'S PRICE STRUCTURE

The price which Purolator charges WDs for its filters depends upon the marketing channel through which the filters move to the ultimate consumer. Thus, if a WD sells to a jobber or a fleet operator, the WD receives a discount which he would not and does not receive on sales directly to dealers.

Purolator sells its automotive replacement filters to WDs according to the following discount schedule:

(1) to all WDs, a 5% discount on suggested resale prices to jobbers;

(2) to all WDs, a 15% discount on sales to unaffiliated jobbers;

(3) to WDs which distribute filters to affiliated jobbers, a discount equal to 4% of Purolator's suggested resale prices to jobbers.

On a hypothetical sales price to the ultimate consumer of $1.00, the suggested resale price to the jobber is 40¢ (or 34¢ when the jobber sells to a fleet operator). Purolator's prices to WDs, after discounts, would be as follows:

(1) to a WD without affiliated jobbers which sells to independent jobbers — 32¢ (60% – (5% + 15%));

(2) to a WD which distributes filters to affiliated jobbers who in turn sell to independent jobbers — 30.4¢ (60% – (5% + 15% + 4%));

(3) to a WD without affiliated jobbers which resells directly to dealers — 38¢ (60%–5%);

(4) to a WD which distributes filters to affiliated jobbers who in turn sell to dealers — 36.4¢ (60% – (5% + 4%)).

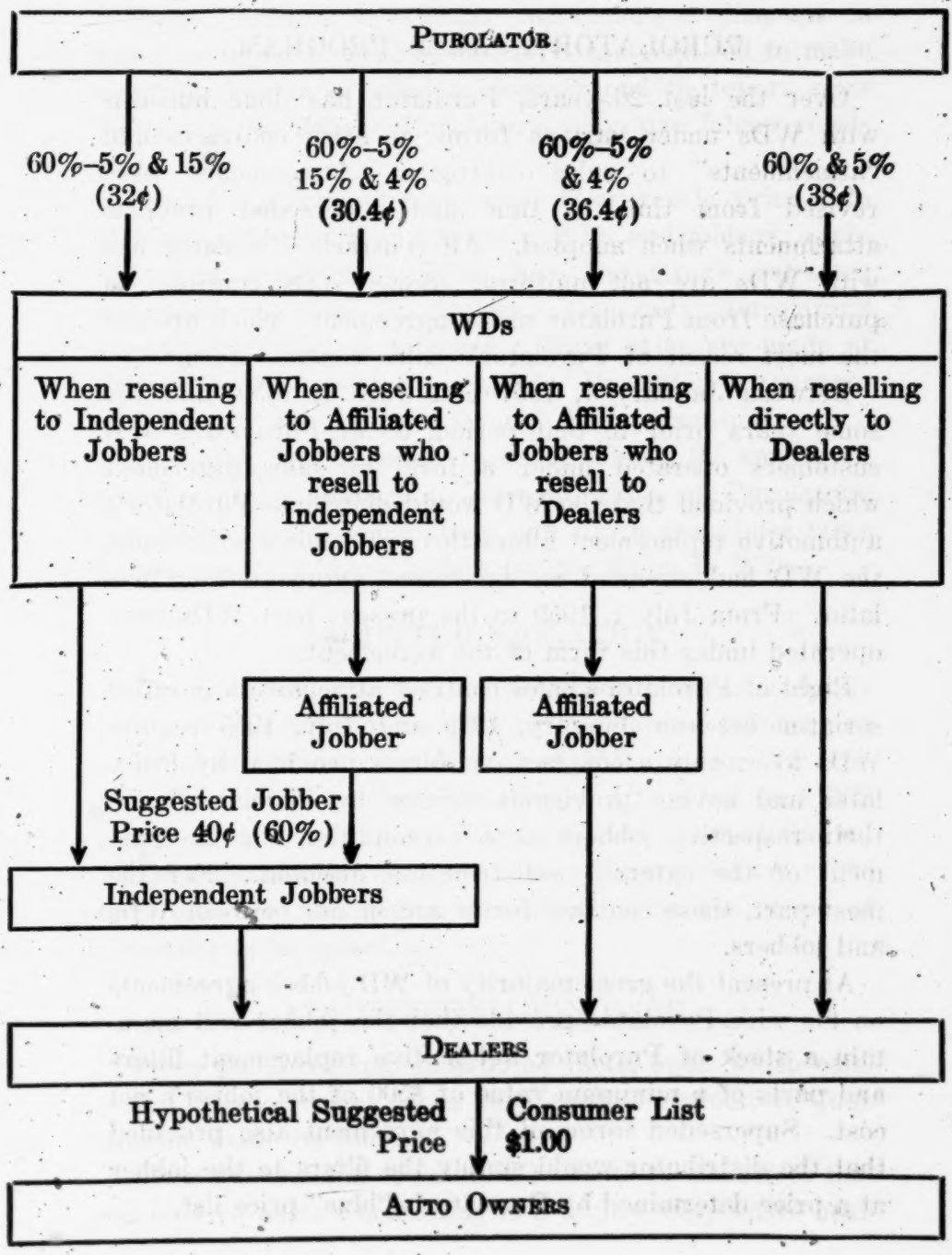
(5) to a WD without affiliated jobbers which resells to a jobber reselling to a fleet operator — 26¢ (60% – (5% + 15% + 15%)).

(6) to a WD with affiliated jobbers who resell to fleet operators — 24.4¢ (60% – (5% + 15% + 15% + 4%)).

Jobbers compete with WDs in selling to dealers and fleet operators. If jobbers can be legally considered to be purchasers from Purolator, then the following further price differences exist. In reselling filters to dealers, a jobber pays 40¢ for the filter while WDs without affiliates pay 38¢ and WDs with affiliated jobbers pay 36.4¢. In reselling filters to fleet operators, jobbers pay 34¢ while WDs without affiliated jobbers pay 32¢ and distributing WDs with affiliated jobbers pay 30.4¢.

Thus it is clear that WDs which redistribute to affiliated jobbers receive a 4% discount that WDs which do not redistribute to affiliated jobbers do not receive. This extra 4% discount is known as the internal redistribution discount. The 15% discount which all WDs receive on sales to jobbers is known as the external redistribution discount.

The foregoing pricing schedules, exclusive of fleet prices, may be more graphically portrayed as follows:


PUROLATOR
60%–5% & 15% (32¢)
60%–5% 15% & 4% (30.4¢)
60%–5% & 4% (36.4¢)
60% & 5% (38¢)
WDs
When reselling to Independent Jobbers
When reselling to Affiliated Jobbers who resell to Independent Jobbers
When reselling to Affiliated Jobbers who resell to Dealers
When reselling directly to Dealers
Affiliated Jobber
Affiliated Jobber
Suggested Jobber Price 40¢ (60%)
Independent Jobbers
DEALERS
Hypothetical Suggested Price
Consumer List $1.00
AUTO OWNERS

PUROLATOR'S SALES PROGRAM

Over the last 26 years, Purolator has done business with WDs under various forms of sales contracts and "attachments" to sales contracts. Attachments were revised from time to time and superseded previous attachments when adopted. All contracts Purolator has with WDs are not uniform. Some WDs continue to purchase from Purolator under agreements which are not the most recent of Purolator's sales contract forms.

Between January 1, 1957 and July 1, 1959, and for some years prior to that period, 58 of Purolator's WD customers operated under a form of sales agreement which provided that the WD would distribute Purolator's automotive replacement filters through jobbers with whom the WD had executed an agreement approved by Purolator. From July 1, 1959 to the present four WDs have operated under this form of the agreement.

Eight of Purolator's sales contract attachments in effect seriatim between January, 1955 and July, 1959 require WDs to execute a contract, on forms provided by Purolator and having provisions written by Purolator, with their respective jobbers as a precondition for the payment of the external redistribution discount. For the most part, these contract forms are in use between WDs and jobbers.

At present the great majority of WD-jobber agreements on file with Purolator provide that the jobber will maintain a stock of Purolator automotive replacement filters and parts of a minimum value of $500 of the jobber's net cost. Superseded forms of this agreement also provided that the distributor would supply the filters to the jobber at a price determined by Purolator's "blue" price list.

Since Purolator's external redistribution discount is based upon sales, most of the WDs are required to make monthly reports of sales to jobbers and to report sales figures on the basis of Purolator's suggested jobber resale price list.

Purolator draws up suggested filter resale price lists and generally distributes them to WDs and jobbers. Jobbers and occasionally WDs and Purolator's salesmen distribute the lists to dealers. Generally, Purolator's suggested prices are followed. When sales are made at prices below Purolator's schedule, Purolator encourages adherence to the schedule through oral persuasion.

Purolator has a sales force of about 80 employees which contacts jobbers to promote sales of Purolator's automotive replacement filters and which sometimes takes and transmits jobbers' orders for the filters to WDs.

ADMITTED VIOLATION

Purolator has admitted a price discrimination and violation of the Act with respect to Purolator's granting an external redistribution discount of 15% to one WD (referred to as "Warehouse Distributor A"), when that WD resold to dealers. Other WDs were not granted the external redistribution discount when selling to dealers. The only question concerning this violation is the scope of the order to be issued.

COMMISSION'S FINDINGS

From the foregoing undisputed facts, upon which complaint counsel relied in its case against Purolator, Commission made its findings.

After quoting the stipulation of facts to the effect that automotive parts wholesaling is a highly competitive busi-

ness having high costs and low profit margins and that wholesalers consider small percentage discounts to be important, perhaps crucial, to a profitable business, Commission found that the systematic granting of a price differential between Purolator's customers had a tendency to injure competition. In so finding, Commission rejected as not being relevant to the issue of competitive injury cost studies which Purolator offered in evidence. These cost studies, Purolator asserted, demonstrated that the 4% discount Purolator granted to WDs which redistribute to affiliated jobbers was less than the cost of redistribution those WDs bore.

Commission next found that the jobbers who purchase only from WDs were "purchasers" of Purolator within the meaning of Section 2(a) of the Act. In arriving at the conclusion that jobbers were the "purchasers" of Purolator, Commission applied the "indirect purchaser" concept to the facts of the case. That is, Commission held that Purolator exercised enough control over the terms of the sale between the WDs and jobbers that the jobbers could be considered to be purchasers of Purolator.

Commission used the following standards in arriving at its conclusion that jobbers were purchasers of Purolator:

> "Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders

by the manufacturer's salesmen even though the orders are filled by the intermediary and the manufacturer looks to the intermediary for payment, direct negotiations for changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler."

Purolator claimed that its cost of channeling its filters through a WD to a jobber and thence to a dealer was 6¢ greater than its cost of selling to a dealer through a WD. Purolator asserted that this was so because the WD which sold directly to a dealer paid Purolator 6¢ more than a WD who sold through a jobber. Commission concluded that this contention of Purolator did not satisfy the cost justification defense of Section 2(a) of the Act because Purolator was in fact attempting to use its prices rather than its costs to justify its differences in prices to WDs.

Finally, Commission found, *inter alia,* that Purolator's adoption of the 4% internal redistribution discount was not made in good faith to meet competition (a Section 2(b) defense) because the discount was not an individual response to competition and because Purolator filters were not shown to be of the same quality or to have the same public acceptance as those of Purolator's competitors.

It is well settled that Commission findings of fact are to be upheld if supported by substantial evidence. 15 U.S.C.A. §21(c); *National Macaroni Manufacturers Association* v. *F.T.C.*, 7 Cir., 345 F. 2d 421 (1965); *National Lead Company* v. *Federal Trade Commission,* 7 Cir., 227 F. 2d 825 (1955), rev'd on other grounds, 352 U.S. 419 (1957); *Fort Howard Paper Co.* v. *Federal Trade Com'n,* 7 Cir., 156 F. 2d 899 (1946), cert. denied, 329 U.S. 795 (1946).

The weight to be given to facts stipulated or proven, as well as the inferences to be drawn therefrom, are for Commission, and not the courts, to determine. *Corn Products Co.* v. *Comm'n*, 324 U.S. 726 (1945); *Trade Comm'n* v. *Staley Co.*, 324 U.S. 746 (1945); *Fed. Trade Com.* v. *Pac. Paper Assn.*, 273 U.S. 52 (1927); *National Macaroni Manufacturers Association* v. *F.T.C.*, 7 Cir., 345 F. 2d 421 (1965).

It cannot be said that Commission's conclusion that injury to competition could result from Purolator's pricing system is not supported by the evidence or that it is unreasonable since the Act requires only a showing of the possibility of injury to competition. *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956); cert. denied, 355 U.S. 941 (1958).

Purolator contends that Commission refused to allow Purolator to use customer cost evidence to disprove competitive injury while Commission itself used customer cost evidence to prove competitive injury. Purolator claims that its customer cost studies were relevant to the issue of competitive injury and that Commission, by rejecting the studies and admitting cost evidence of complaint counsel, established two rules of evidence, one favoring complaint counsel and one disfavoring Purolator.

Purolator's cost studies showed that the cost of redistribution to affiliated jobbers by WDs was in all cases greater than the 4% internal redistribution discount Purolator granted these WDs. If such is the case, Purolator argues, then the WDs receiving the 4% discount did not receive a net advantage, and, therefore, competition was not and could not be injured.

Purolator's offer to prove that the advantage to WDs with affiliated jobbers was dissipated was not an offer to prove that the WDs did not on the whole receive an

advantage from the 4% discount. Companies competing in the same line may experience different costs, and if those costs are a result of the company's method of operation, evidence that a seller helped some of its customers defray those costs while it did not help others is not relevant to disprove competitive injury. Such evidence only tends to show that some WDs have costs peculiar to their manner of doing business; it does not show nor could it show that competitors of these WDs would not be injured if some of those costs are paid by Purolator.

Commission, on the other hand, used industry-wide profit and cost averages, rather than individual customer costs for redistribution of a line, to show that wholesalers of automotive parts operated on small per unit profit margins. With such small profit margins in a highly competitive industry, an incremental price advantage per unit could be the difference between a successful or unsuccessful business in the automotive replacement filter line. Commission evidence was not the same type of evidence Purolator offered and clearly goes to the question of competitive injury. Cf. *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U. S. 941 (1958).

We conclude that Commission did not create two rules of evidence, one favoring itself and the other disfavoring Purolator. Commission merely assessed the relevancy of Purolator's proffered evidence and did so properly.

Purolator further asserts that if probable competitive injury existed, its 4% discount did not cause it, for Purolator's nonfavored WD customers were able to purchase automotive replacement filters from Purolator's competitors at lower prices than Purolator charged. Hence, Purolator claims, there is no causal nexus between the

competitive injury and Purolator's price discrimination. As authority Purolator cites *Tri-Valley Packing Association* v. *F.T.C.*, 9 Cir., 329 F. 2d 694 (1964).

In that case, the court remanded proceedings to Commission for the purpose of finding facts relating to the availability to non-favored purchasers of the same prices that respondent granted to favored purchasers for the same product in the same market. But in *Tri-Valley* the question of availability of lower prices to non-favored purchasers related to the *seller's* product, and not, as here, to similar products of competitors.

Competitive injury in the instant case could not be due to the failure of non-favored buyers to take advantage of buying the product at the same prices as the favored buyers, for the non-favored buyers could not buy Purolator's filters at the same prices. The required causal nexus for competitive injury is established by a showing that there is a demand for Purolator's filters and not just a general demand for automotive replacement filters.

The Commission's finding of probable competitive injury and Purolator's responsibility for it was supported by substantial evidence.

There are obvious price discriminations in this case since there are price differences to Purolator's different classes of competing customers. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549-51 (1960). Although price discriminations exist, the question remains whether the Act proscribes or excuses the particular discrimination.

There are in this case two general price discriminations, the price differential between jobbers and WDs and the price differential between WDs without affiliated jobbers and WDs with affiliated jobbers. These two discriminations may be treated separately.

It seems clear that if jobbers can be considered to be purchasers from Purolator within the meaning of the Act, then the fact that WDs pay Purolator less on sales to dealers and fleet operators than competing jobbers pay would amount to a price discrimination under the Act.

Purolator challenges the Commission finding that jobbers were purchasers from Purolator on the ground that the indirect purchaser concept used by Commission has no legal basis. If the indirect purchaser concept is legally sound, Purolator asserts that Commission has not shown that Purolator exercises the amount of control required to justify Commission's application of the concept.

Commission has used an indirect purchaser concept in the following cases: *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537 (1937); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943); *Elizabeth Arden, Inc., et al.*, 39 F.T.C. 288 (1944); aff'd 2 Cir., 156 F. 2d 132 (1946), cert. denied, 331 U.S. 806 (1947); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); and *General Motors Corp. et al.*, 50 F.T.C. 54 (1953).

The Second Circuit has upheld the indirect purchaser doctrine:

> "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailer and controls the terms upon which he buys." *American News Company* v. *F.T.C.*, 2 Cir., 300 F. 2d 104, 109 (1962), cert. denied, 371 U.S. 824 (1962).

To ensure fair competition among purchasers from the same seller, the Robinson-Patman Act amendments to

the Clayton Act forbade sellers to make price discriminations between purchasers except when justified by economies to the seller. If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition. *American News Company* v. *F.T.C., supra.*

While not passing upon the legality of the indirect purchaser doctrine because it was not challenged, this court in *E. Edelmann & Company* v. *Federal Trade Commission,* 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U. S. 941 (1958) affirmed, without comment upon the doctrine, a Commission decision in which the doctrine was used.

The question whether the indirect purchase doctrine of Commission has a legal basis is what is said to be a mixed question of law and fact. See e.g., 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 30. When similar questions concerning the application of statutory categories to facts have arisen, the Supreme Court has had occasion to accept an administrative agency's application of a statute if the application had a "'warrant in the record' and a reasonable basis in the law." *Board* v. *Hearst Publications,* 322 U. S. 111, 131 (1944).

"In a matter left specifically by Congress to the determination of an administrative body * * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing

* * * and an application of the statute in a just and reasoned manner." *Gray* v. *Powell*, 314 U. S. 402, 411 (1941).

In a recent case, the Supreme Court reviewed the action of a district court in the setting aside of an order of the Interstate Commerce Commission in which the Commission interpreted and applied the words "contract carrier by motor vehicle" in the Interstate Commerce Act. The Supreme Court stated:

> "The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. * * *. Because the Commission's resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedents so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission." *United States* v. *Drum*, 368 U. S. 370, 375-76 (1962).

In view of the policy underlying the amendments to the Clayton Act, the indirect purchaser doctrine of Commission appears to have a reasonable application to the facts of this case and a rational basis in law.

Purolator further asserts, however, that if Commission's indirect purchaser concept is sound, Commission nevertheless has not shown that Purolator exercises the amount of control required to apply the concept. Purolator's proffered evidence would tend to show that in fact it had made no effort to control sales to jobbers. The stipulation, on the other hand, shows that Purolator at one time had reserved to itself the legal right to control

sales and that Purolator wrote and supplied the WD-jobber agreements, as well as suggested resale price lists. The stipulation further states that Purolator solicited jobbers and urged them to maintain prices, which they for the most part did. Commission's finding is supported by substantial evidence.

In so finding, it is not necessary to pass upon the degree of seller control required to constitute a buyer once or more times removed a purchaser within the meaning of the Act; it is only necessary to conclude that Commission's finding of control was reasonable in view of the evidence, even though a court might have interpreted the evidence otherwise. We so hold.

Purolator claims that a "cost" incurred by a manufacturer in the form of a discount to a WD for redistributing to an affiliated jobber can be used as a cost-justification defense under §2(a). What Purolator terms a cost to itself is merely the difference in the prices at which it sells to WDs. The cost justification intended by the Act relates to costs "of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *." 15 U.S.C.A. §13(a).

Subsection (b) of Section 2 of the Act places the burden of rebutting a prima facie case of price discrimination by showing a justification upon the person charged with violation of the section. Although Purolator had the opportunity at the hearing before Commission of offering evidence as to its difference in costs of manufacture, sale, or delivery to different purchasers as contemplated by the Act, it failed to do so. Instead, it offered only evidence of its prices.

Purolator also claims that its 4% discount was made in good faith to meet an equally low price of a competitor,

a §2(b) defense under the Act. As with the cost justification defense, the burden of proof of the claim was upon Purolator, 15 U.S.C.A. §13(b), and the findings of Commission are to be upheld if supported by substantial evidence, 15 U.S.C.A. §21(c); *Trade Comm'n* v. *Staley Co.*, 324 U.S. 746 (1945); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 7 Cir., 241 F. 2d 37 (1957), cert. denied, 355 U.S. 941 (1958); *Whitaker Cable Corporation* v. *Federal Trade Comm'n*, 7 Cir. 239 F. 2d 253 (1956); *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1956), cert. denied, 355 U.S. 941 (1958).

The evidence which Purolator offered showed that originally Purolator granted the same total discount as its major competitors, although its discount schedule was not identical to theirs. After first raising its prices, Purolator lowered its prices to some of its WDs by 4%. Purolator states it changed its price discount schedule in the hope that WDs without jobber affiliates would concentrate on reselling to independent jobbers. These WDs would earn a 15% external redistribution discount. WDs with affiliated jobbers, however, sold to their affiliated jobbers in addition to selling to independent jobbers. On sales to their own jobbers, the WDs with affiliates were not granted a 15% discount. Purolator, in order to prevent defection to competitors of its customer-WDs with affiliates, granted a 4% internal redistribution discount to them.

WDs with affiliated jobbers, however, sell to independent jobbers. This qualifies the former for the 15% discount. As a result, in the case of a sale by WDs with affiliated jobbers to an independent jobber, Purolator goes below the prices of its competitors by 4%. Insofar as it does that, Purolator's defense of meeting competition in good faith fails, for Purolator has more than met competition.

The situation is no different when WDs sell to dealers and to fleet operators. When selling to dealers, the WD discount is 60% off the car owner price plus 5%. If the WD resells to affiliated jobbers who in turn resell to dealers, the WD receives an additional 4% discount. Purolator's evidence of the price schedules of its two major competitors revealed that their discounts in dealer sales were 60% − 9% and 60% − 10%. Thus, only those customers of Purolator which had affiliated jobbers received a price equivalent to that of one of the major competitors (60% − (5% + 4% versus 60% − 9%). WDs without affiliates which sold directly to dealers suffered a 4% disadvantage. If, as Purolator argues, it lowered its prices to meet the equally low prices of competitors, it did not lower its prices equally for all WDs which sold to dealers.

Purolator's argument that WDs reselling to affiliated jobbers do not receive the 15% external redistribution discount is not relevant here because there is no sale to a jobber. One group of WDs has been favored over another. We conclude that Purolator has not met its burden of showing that its 4% internal redistribution discount was offered to meet the equally low price of a competitor.

Purolator objects to the Commission order on the grounds that it merely paraphrases §2(a) of the statute, that it is too broad, and that it is so vague, indefinite and uncertain that Purolator cannot know what it prohibits.

Purolator was ordered to cease and desist from:

> "Discriminating, directly or indirectly, in the price of such products of like grade and quality: By selling to any direct or indirect purchaser at net prices higher than the net prices charged to any other purchaser, direct or indirect, who in fact competes with

> the purchaser paying the higher price in the resale and distribution of respondent's replacement filters."

This form of order is quite similar to that upheld by courts in other cases. See, e.g., *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Moog Industries* v. *Federal Trade Commission*, 8 Cir., 238 F. 2d 43 (1956), aff'd, 355 U.S. 411 (1958).

This court in *E. Edelmann & Company* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152 (1957), cert. denied, 355 U.S. 941 (1958) approved an order in all respects almost identical to the present order. It was said there at p. 156:

> "The order encompasses only the specific means by which petitioner has discriminated in the past and is broad enough to prohibit variances which would accomplish the same result. The Commission is not required to confine its order to the narrow area transgressed by petitioner, it must be permitted sufficient leeway so that its order may not be reduced to a nullity by technical, but not actual, compliance."

As to Purolator's inability to determine what is forbidden it, the Supreme Court has provided the answer:

> "If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order." *F.T.C.* v. *Colgate Palmolive Co.*, 380 U.S. 375, 394 (1965).

We hold that Commission's order is within the permissible limits afforded Commission in this case.

Finally, pursuant to 15 U.S.C.A. §21(c), Purolator has moved for leave to adduce additional evidence to be taken by Commission. By such evidence Purolator seeks to show that it does not incur costs in making direct sales which it does not incur in making indirect sales; and that its filters are the same grade and quality and enjoy substantially the same public acceptance as the filters of competitors whose competition it was allegedly meeting by its 4% discount.

We have carefully considered all propositions urged in support of the motion and Commission's objections thereto. Without further extending an opinion already much too long, it has not been shown to our satisfaction that such additional evidence is material. Further, Purolator has not established it had reasonable grounds for its failure to adduce such evidence in the prior proceeding before Commission. 15 U.S.C.A. §21(c); *F.T.C.* v. *Washington Fish & Oyster Company*, 9 Cir., 271 F. 2d 39, 43, (1959). The motion is denied.

For the foregoing reasons, the cease and desist order of the Federal Trade Commission under review in this proceeding is in all respects affirmed and will be enforced.

ORDER ENFORCED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix C

Judgment Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Friday, October 22, 1965

Before—Hon. JOHN S. HASTINGS, Chief Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

PUROLATOR PRODUCTS, INC., *Petitioner,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition to review an order of the FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the Federal Trade Commission on April 7, 1964, be and the same is hereby AFFIRMED in all respects and will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation, an appropriate decree will be entered.

Appendix D

Final Decree Enforcing Order to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PUROLATOR PRODUCTS, INC., *Petitioner,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	No. 14,704

FINAL DECREE ENFORCING ORDER TO CEASE AND DESIST

Purolator Products, Inc., a corporation, petitioner herein, having filed in this Court on July 1, 1964, a petition to review and set aside an order to cease and desist issued against it on April 3, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Purolator Products, Inc., a corporation, Docket 7850"; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on September 17, 1965, and this Court having rendered its decision and judgment on October 22, 1965, affirming and directing the enforcement of the said order to cease and desist;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, enforced, and that petitioner be, and it hereby is, commanded to obey the said order and to comply therewith.

By the Court.

JOHN S. HASTINGS
WIN G. KNOCH
LUTHER M. SWYGERT
United States Circuit Judges

Entered: Nov. 15, 1965.

Office-Supreme Court, U.S.
FILED
APR 1 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 328

PUROLATOR PRODUCTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI

SUMNER S. KITTELLE, Esq.,
ALLAN TRUMBULL, Esq.,
Counsel for Petitioner,
1 Chase Manhattan Plaza,
New York, New York 10005.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 928

PUROLATOR PRODUCTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI

Petitioner, Purolator Products, Inc. ("Purolator"), through its counsel, respectfully moves the Court for leave to amend its Petition for a Writ of Certiorari ("Petition"), so as to present the following additional question to the Court:

> 7. Whether the Federal Trade Commission ("FTC") has the power to issue an order to cease and desist where (i) only three Commissioners participated in the decision to issue such order, (ii) only two of these voted in favor of the order in the form in which it was issued, (iii) one of the three entered a dissenting opinion which would have required modification of the order, and (iv) at the

time the order was issued there was one vacancy on FTC and one Commissioner did not participate for the reason that he had not heard oral argument.[1]

Purolator filed the Petition on January 19, 1966. On March 22, 1966 the Court, with consent of counsel for Purolator, extended the Solicitor General's time to file a response to the Petition to and including April 19, 1966.

As grounds for this motion, Purolator's counsel states:

1. Oral argument before FTC in this case was had on June 3, 1963 before Commissioners Anderson, Elman, MacIntyre and Higginbotham. Chairman Dixon was not present (R. 811).[2] The majority opinion, written by Chairman Dixon and joined in only by Commissioner MacIntyre, was issued on April 3, 1964. Newly appointed Commissioner Reilly did not participate because he did not hear oral argument (R. 70). Commissioner Elman dissented (R. 73 et. seq.). Commissioners Anderson and Higginbotham had left FTC and did not participate in the decision. In other words, a majority of a quorum of FTC held against Purolator but neither a majority of FTC's five authorized members nor a majority of its then four members held against Purolator on the issues with respect to which Commissioner Elman dissented.

2. Commissioner Elman was against outlawing any of the challenged parts of Purolator's price structure, which he characterized as "an intricate and finely balanced

1. Even though he did *not* hear oral argument, Chairman Dixon wrote the "majority" opinion. Unlike Commissioner Reilly, he did not disqualify himself.

2. References to R. shall mean the stated page in the Joint Appendix, nine copies of which have been filed by Purolator for this Court's use.

pricing system" (R. 73). Specifically, he was opposed to outlawing either Purolator's 4% internal redistribution discount or the price differentials between "indirect purchaser" jobbers and direct purchasing WDs. Thus, every issue which is presented to this Court in Purolator's Petition, and every issue which was before the court of appeals, was decided adversely to Purolator by only two Commissioners (and only one of these was present for the oral argument).

3. Notwithstanding this lack of concurrence by three Commissioners, Purolator did not ask FTC to reconsider its decision and order for a very good reason. Seven days after the issuance of the Purolator order, FTC held in *The Borden Company,* FTC Dkt. No. 7474, *Order Denying Respondent's Petition for Reconsideration* (April 10, 1964) that a majority of a quorum of FTC is sufficient to sustain the validity of a final order. Therefore, it seemed futile to ask FTC again to consider this point.

4. Purolator did not specifically raise the issue before the court of appeals because of the *Borden* decision and what seemed at the time the settled nature of the law regarding the "majority-of-a-quorum" rule for FTC orders.[3]

---

3. The relevant portion of FTC's decision in *Borden* on this issue is relatively short:

> "Three of the five members of the Commission participated in the decision which consists of an opinion and final order. In the absence of statutory provision, these three members constituted a quorum for the transaction of business, in accordance with the Commission's rules. * * * Two of the three members participating concurred in the decision. The Commission being an administrative body, a majority of a quorum is sufficient to sustain the validity of a final order. * * *"

Purolator's petition to the Court of Appeals to review FTC's order was dated June 26, 1964 and its Brief to the court of appeals was filed March 31, 1965. On April 12, 1965, the Sixth Circuit affirmed FTC's "majority-of-a-quorum" rule. *Atlantic Refining Company* v. *FTC,* 344 F. 2d 599, 607 (6th Cir. 1965).

Purolator did, however, present the facts and refer to the unfairness of the 2-1 decision in its Petition to Review (R. 78-79) and Brief to the court of appeals, Brief of Petitioner, p. 8, *Purolator Products, Inc.* v. *FTC*, 352 F. 2d 874 (7th Cir. 1965). For the same reason Purolator did not raise the issue in the Petition before this Court, although it did refer to the 2 to 1 vote on page 4 thereof.

5. On March 16, 1966 the United States Court of Appeals for the Ninth Circuit in *Flotill Products, Inc.* v. *FTC*, —— F. 2d —— (9th Cir. 1966), held that an order of FTC must be supported by at least three Commissioners. (See Appendix, *infra* (printed) pp. 1a to 11a; also 18a)[4] In *Flotill* the Ninth Circuit remanded to FTC that portion of a Robinson-Patman Act order dealing with the "brokerage" charge because the order was issued (exactly as was the order here) by a two to one vote of three Commissioners, with one vacancy on FTC and one Commissioner not participating because he had not heard oral argument. The remand was for further hearings to determine whether a majority of FTC desired to enter such an order. In so acting, the Court expressly overturned a rule which had been in effect for 40 years. (See Appendix, *infra* (printed) p. 8a.)

6. The decision in *Flotill* (Appendix, *infra* (printed) pp. 1a to 11a) sets forth the Ninth Circuit's reasons for holding that FTC may not validly enter an order by vote of less than three commissioners. Nowhere in the Federal Trade Commission Act did Congress provide that FTC could act with the concurrence of less than a majority of its members. The powers delegated to FTC by Congress

4. Counsel for Purolator first became aware of the decision by an article in The Wall Street Journal for March 25, 1966.

are delegated to the "Commission" as such, and not to any lesser group of individual commissioners. Thus cease and desist orders under Section 5 of the Federal Trade Commission Act are to be entered by "the Commission." 15 U.S.C. §45(b). Similarly, final orders entered by FTC under the Clayton Act (as in the present case) are to be entered by "the Commission." 15 U.S.C. §21(b). In no case can an order entered with the concurrence of only two of FTC's five members be said to be an order of "the Commission."

When Congress has desired to give an agency power to act with the concurrence of less than a majority of its members, it has so stated by statute. See, e.g., 5 U.S.C. §133z-15, Reorganization Plan No. 7 of 1961, §102(d) (Federal Maritime Commission); 16 U.S.C. §792 (Federal Power Commission); 29 U.S.C. §153(b) (National Labor Relations Board); 42 U.S.C. §1975(e) (Civil Rights Commission); 49 U.S.C. §17(3) (Interstate Commerce Commission); 49 U.S.C. §1321(c) (Civil Aeronautics Board). No such provision appears in the Federal Trade Commission Act or Clayton Act. Since Congress has not provided that FTC may act without the concurrence of a majority of its members, a final order entered with the concurrence of less than a majority of the Commissioners is *ultra vires* and void.

7. The fact that Purolator did not raise this issue until the decision in *Flotill* was made public, should not preclude it from raising the issue at this time. This Court has held that in similar circumstances a petitioner, such as Purolator, is not precluded from raising such an issue after the advent of intervening authority, despite its failure to raise the issue below. In *Hormel* v. *Helvering*, 312 U. S. 552 (1941), the Board of Tax Appeals had

held against the Commissioner, deciding that certain trust income was not taxable to petitioner under either §166 or §167 of the Revenue Act of 1934. In the court of appeals, the Commissioner abandoned reliance on §166 but not on §167, and argued additionally that the income was also taxable under §22(a). This further argument was predicated on a decision of this Court rendered subsequent to the decision of the Board. Petitioner argued that §22(a) was not at issue because it was not raised before the Board. The court of appeals ruled, however, that §22(a) could properly be considered and held the income taxable thereunder and not under §166 or §167. Petitioner challenged in this Court the power of the court of appeals to pass upon questions not presented before the Board. This Court acknowledged that ordinarily an appellate court does not give consideration to issues not raised below (*Id.* at 556), but stated:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. * * * Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: * * * those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." (*Id.* at 557-59)

The instant proceeding falls squarely within the above principle.

Even in *U. S.* v. *L. A. Tucker Truck Lines*, 344 U. S. 33 (1952), where the "general rule" was followed, this

Court indicated that in cases involving defects in an administrative agency's "power or jurisdiction" to act, the "general rule" should not be followed because, even in the absence of timely objection, the agency's order must be set aside as a nullity, 344 U. S. at 38. The question raised in this motion and in the *Flotill* case obviously involves FTC's "power or jurisdiction" to act.

It is respectfully submitted that this Court should grant the motion to amend Purolator's Petition for Certiorari and either grant the writ on the question presented herein or postpone decision thereon until this Court has passed upon any petition for certiorari which may be filed in the *Flotill* case.[5]

Wherefore, Purolator prays that this motion and the Petition, as amended, be granted.

Respectfully submitted,

SUMNER S. KITTELLE

Sumner S. Kittelle, Esq.

ALLAN TRUMBULL

Allan Trumbull, Esq.
Counsel for Petitioner

April 1, 1966

5. There being a direct conflict between the Sixth Circuit's decision in *Atlantic Refining supra*, note 3, and the Ninth Circuit's decision in *Flotill*, it seems almost inevitable that a petition for certiorari will be filed in *Flotill*.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Corrected

No. 19,521

Flotill Products, Inc., a corporation, Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individually and as officers of said corporation,

Petitioners,

vs.

Federal Trade Commission,

Respondent.

[March 16, 1966]

On Petition to Review and Set Aside an Order of the Federal Trade Commission

Before: Barnes and Hamley, Circuit Judges; and Mathes, Senior District Judge

Barnes, Circuit Judge:

This is a petition to review and set aside an order of the Federal Trade Commission against petitioners. The Federal Trade Commission had jurisdiction to conduct the proceedings below pursuant to section 11(a) of the Clayton Act, 15 U.S.C. § 21(a). This court has jurisdic-

tion to review the order of the Commission pursuant to section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), and section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c).

Petitioners in this proceeding are Flotill Products, Inc., which in June 1961 changed its name to Tillie Lewis Foods, Inc., and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, the owners and officers of the corporate petitioner. Flotill is a California corporation engaged in the processing, canning, and sale of certain fruit and vegetable items. Flotill also packs a line of dietetic foods which were not involved in the proceedings below. Mrs. Lewis owns 94.5% of Flotill's stock and is its president and executive officer. Albert S. Heiser owns 2.744% of Flotill's stock and is its vice president in charge of sales. Arthur H. Heiser owns 2.748% of the Flotill stock and is its vice president in charge of production. The Heisers are nephews of Mrs. Lewis.

On August 6, 1958, the FTC issued a complaint against the corporate and individual petitioners, alleging violations of sections 2(c) and (d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(c), (d). The section 2(c) charges were founded on the conduct of Flotill in:

(1) Discontinuing the payment of a 2½% commission to the brokerage firm of Bushey & Wright, sometime prior to 1955, on sales made directly to the Nash-Finch Company, a large mid-western wholesale grocer, and the subsequent payment to Nash-Finch of a 2½% allowance for advertising and promotion which the FTC counsel contended were really payments "in lieu of brokerage" proscribed by section 2(c); and

(2) the payment by Flotill and Nash-Finch of ½% each to Bushey & Wright for work in arranging "pool car" shipments from Flotill to Nash-Finch of less than car-load lots which was instituted after Flotill had stopped paying Bushey & Wright the 2½% commission on its direct sales to Nash-Finch.

The section 2(d) charges were based on the discriminatory payment by Flotill of promotional allowances in 1956-1957 to Elm Farm Foods Company and Stop & Shop, Inc., retail grocers in the Boston, Massachusetts area, while not paying such promotional allowances to First National Stores, Great Atlantic & Pacific Tea Company, Star Market Company, and Supreme Markets, Inc., who were in competition with the "favored" customers in the Boston area.

Proceedings before a hearing examiner of the FTC began on July 7, 1959, but were delayed while the petitioners' refusal to comply with a subpoena duces tecum was being litigated. 6 F.T.C. Statutes and Court Decisions 665 (1959), *Flotill Products, Inc.* v. *F.T.C.*, 278 F.2d 850 (9th Cir.), *cert. denied*, 364 U.S. 920 (1960). At the conclusion of resumed hearings, the hearing examiner issued his opinion on March 25, 1963, in which he sustained the section 2(d) charge and that portion of the 2(c) charge relating to discounts "in lieu of brokerage" to Nash-Finch, but found that petitioners' dealing with field brokers did not violate section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. Cross-appeals were taken from the hearing examiner's decision to the Commission, which issued its decision on June 26, 1964, upholding the hearing ex-

aminer's determination as to the 2(c) and 2(d) violations, but reversing his determination that the order to be entered should not apply to the individual petitioners as well as to the corporation.

Procedural questions arise as a result of the hearing before the Commission, in that the full Commission consists of five members but only three participated in the decision because there was one vacancy and one commissioner did not hear the oral arguments and did not join in the decision. The opinion for the Commission was written by Chairman Dixon; Commissioner MacIntyre wrote a separate opinion concurring with Dixon with the exception of the dismissal of the charge concerning dealings with "field brokers"; and Commissioner Elman filed a separate opinion in which he *concurred* in the result as to the 2(d) charge and the inclusion in the order of the corporate officers in their individual capacities, *agreed* with the result but differed on the reasoning as to the dismissal of the 2(c) charge insofar as it pertained to "field brokers" transactions, and *dissented* from the holding that the allowances which Flotill gave to Nash-Finch were "in lieu of brokerage and therefore violated section 2(c)."

Following the issuance of the Commission decision, petitioners here filed a petition for reconsideration before the Commission. Reconsideration was denied in an order issued September 3, 1964, in which the grounds for reconsideration were answered by the Commission. This petition to review and set aside the final order of the Commission followed.

I—*Alleged Procedural Defects.*

Petitioners contend that the Commission's order must be set aside as to both the section 2(c) and 2(d) orders because at least three members of a five member commission must affirmatively vote for an order, and must vote for it on the same grounds in order for it to become a valid order of the commission. Petitioners argue that this requirement was not met as to the section 2(c) order because only Commissioners Dixon and MacIntyre agreed to it and Commissioner Elman dissented, and was not met as to the section 2(d) order because Commissioner Elman's concurrence does not indicate that it was on the same grounds or relied on the same evidence as that relied upon by Dixon and MacIntyre.

First, as to the section 2(c) decision in which only two Commissioners agreed. We have examined the authority and arguments put forth by both parties and find ourselves in agreement with petitioners that, absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission. (Tr. 119) This was not done in the case of the 2(c) order here in dispute.

Respondent places primary reliance on the case of *Atlantic Refining Company* v. *F.T.C.*, 344 F.2d 599 (6th Cir. 1965). We agree that the language used by the court in that case is authority for respondent's position, but find ourselves unconvinced by the "succinct" disposal of the issue in that case. The court's entire treatment of the point here in dispute is contained in this statement:

> "As to other issues presented by petitioner, we can be more succinct. The rules of the Federal Trade Commission since its inception have provided for

decision by the majority of panels of three members. We believe this rule is within the Commission's power to make and is wholly valid. Drath v. Federal Trade Commission, 99 U.S.App.D.C. 289, 239 F.2d 452 (1956), cert. denied 353 U.S. 917, 77 S.Ct. 666, 1 L.ed.2d 664 (1957)." (344 F.2d at 607.)

Petitioners correctly point out that the court in *Atlantic Refining* both misconstrued the FTC rule[1] and relied upon a case, *Drath, supra,* which is not shown to be in point. In the *Drath* case the court expressed its approval of the Commission rule that "A majority of the members of the commission shall constitute a quorum for the transaction of business." It does not appear that the order which resulted from a three man panel hearing the cause was concurred in by less than three, which would be a majority of the Commission. This did not raise the issue here in dispute. Since the statement from *Atlantic Refining* states a bare conclusion, and makes no attempt to support its position in reason, we are unenlightened as to why the court thought the "majority of the quorum" rule applicable or desirable.

We readily agree respondent's position is also supported by *Frischer & Co.* v. *Bakelite Corporation,* 39 F.2d 247 (C.C.P.A.), *cert. denied* 282 U.S. 852 (1930), wherein the Court of Customs and Patent Appeals stated that "the trend of modern authority is that in collective bodies other than courts, even though they may exercise judicial authority, a majority of a quorum is sufficient to perform the functions of the body." (39 F.2d at 255.) But the court then proceeds to support its statement with a series

[1] That rule states: "A majority of the members of the Commission constitutes a quorum for the transaction of business." 16 C.F.R. 1.7.

of state decisions dealing with town meetings and city councils, which frankly strike us as inapposite when we seek to determine the rule which is to govern decisions of a statutorily created administrative tribunal like the Federal Trade Commission.

Respondent has previously used this case, and the *Drath* case, *supra,* to support the authority of a two-man majority of a three-man quorum. *Borden Co.,* F.T.C. Docket No. 7474, April 10, 1964 (15 Pike and Fischer Administrative Law (2d) 344-5.)

Respondent seeks also to support its position by reference to section 1 of the Federal Trade Commission Act, 15 U.S.C. § 41, and to a rule of the FTC, 16 C.F.R. § 1.7. We do not consider this authority determinative. The pertinent provision in section 1 of the FTC Act (last sentence of first paragraph) states "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."[2] This provision only has the effect of authorizing action by less than the full commission; it does not provide that less than a majority of the full commission may enter a final order, for in the event of a single vacancy a majority of the remaining commissioners is still three. The FTC rule, referred to earlier in the *Atlantic Refining* case, *supra,* provides that "A majority of the members of the Commission constitutes a quorum for the transaction of business." We could, perhaps, agree that the reasonable construction of such a rule would be that a majority of the quorum would be sufficient to render a decision, but do not find that argument dis-

[2] We note the reference in the Act is singular and not plural. Suppose there were plural vacancies? Would respondent contend that if there were four vacancies one member could act?

positive in the absence of a clear showing that the FTC regulation is within the power of the FTC to adopt, tested in the light of the extent of the power conferred upon the FTC by Congress. Respondent stresses the fact that such a rule has been in effect for forty years. We cannot believe that a long adherence to an improper rule (if indeed it is improper) gives the Commission any vested right to continue such adherence. As petitioners accurately point out, when Congress wanted to authorize the exercise of the powers of an administrative body by less than the full body in other situations, it did not lack the words to do so expressly. Cf. National Labor Relations Board, 29 U.S.C. §153(b); Interstate Commerce Commission, 49 U.S.C. §17(1).

We do not desire to overstate our agreement with petitioners in this matter, and therefore we have stated that respondent's position is not without support. As already noted, the *Atlantic Refining* and *Frischer* cases, *supra*, directly support that position, and *Drath*, *supra*, may be said to do so inferentially. It might also be argued, although respondent has not done so, that the express permission of Congress to the NLRB and the ICC to delegate its authority to panels, and congressional acquiescence in the FTC quorum rule for a long period reflects congressional approval of such a policy of expediting the work of administrative bodies. On the other hand, both of the bodies to whom such permission was expressly granted are larger than the FTC and it is difficult to believe that Congress conceived of the five member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission.

Respondent puts forth an additional argument, which we believe merits consideration: that "the necessity of

administrative agencies fashioning their own procedural rules as well as their authority to do so has long been recognized by the courts. See *Federal Communications Commissioner* v. *Schreiber*, ... U.S. ....., 85 Sup.Ct. 1459, 1467 (1965), and cases cited therein." While we agree with the general proposition stated by respondents, we are not assured that it controls the point in dispute here. The *Schreiber* case, for example, dealt with the interpretation of section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j). That legislative action expressly granted to the FCC a measure of autonomy in determining its own procedures. Not only is such a specific grant of power lacking in the Federal Trade Commission Act, but the type of "procedural rules" referred to in *Schreiber* were not of the same nature as the quorum requirement here in dispute. The *Schreiber* case, and a number of cases cited therein, particularly *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248 (1944), *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), and *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), do, as respondent states, refer to the broad powers of administrative bodies in determining their own procedural rules. But in each of these cases the power of the administrative body to do so is premised on its expertise in dealing with one particular specific industry which it was designed to regulate. We do not quarrel with the propriety of administratively determined procedures in such cases, but do not believe that that same principle is applicable in this case *where the problem relates to the interpretation of the FTC's enabling legislation.* We do not think it proper for this court to amend the Federal Trade Commission Act nor to permit it to be amended by a Commission rule, in the absence of a stronger showing

of congressional intent than has been made here, and in the presence of express provisions in the enabling legislation creating other agencies (such as the NLRB and ICC) to accomplish the result sought.

In light of the Commission's adherence to its "majority of a quorum" rule for such an extended period, we do not believe that the proper remedy would be to simply set-aside or deny enforcement of its section 2(c) order. Rather, we remand the section 2(c) violation to the Commission for further hearings to determine whether a majority of the Commission desire to enter such an order. We express no doubt as to the validity of the Commission's practice of conducting hearings before less than the full membership. We say only that an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few.

For the above reasons, we will remand, and await a further determination by the FTC before considering the facts and law relating to the alleged section 2(c) violations.

Petitioners assert that the order regarding the section 2(d) violation should also be denied enforcement because Commissioner Elman concurred in the result, but did not enumerate the grounds for his concurrence, nor the conclusions or findings upon which he based his concurrence, and that consequently "the Commission has provided no 'statement of . . . findings and conclusions' nor 'reasons or basis therefor' as required by Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b)." We cannot agree. We approve the reasoning of the three judge district court in *Chicago, B. & Q. R. Co.* v. *United States,* 60 F.Supp. 580 (E.D. Ky. 1945) where the court

was faced with a similar contention in reviewing a freight rate order of the ICC. While petitioner argues that no grounds to support his concurrence can be taken from Commissioner Elman's simple statement following his section 2(c) dissent that "With respect to the other issues in the present case, I concur in the result" (Record, p. 114, n. 13), we believe it more reasonable to assume that his statement constituted a substantial adoption of Chairman Dixon's opinion for the Commission as to the 2(d) violations. As stated by the court in *Chicago, B. & Q. R. Co., supra,* "We interpret the statement by the fifth Commissioner that he 'concurs in the result' of both reports filed in this case to mean that, while he does not assent to all the comments or observations made therein, he is, nevertheless, sufficiently in accord with the rationale of them to enable him to agree . . . ." 60 F.Supp. at 583.

II—*Promotional Allowances.*

All three Commissioners who participated in the Flotill proceedings agreed that Flotill had violated section 2(d) in two particulars. First, by not making available to Stop & Shop in 1956 and 1957 the same promotional allowance which it made to Elm Farm Foods, a competitor of Stop & Shop in the Boston area, and second, by not making available any similar promotional allowance to customers who competed in the Boston area but who made their purchases in the "California Street" market and shipped the goods to Boston rather than buying through brokers in Boston as Elm Farm Foods and Stop & Shop did.

Petitioners attack the first section 2(d) charge by asserting that Stop & Shop, which did not receive the

allowance in 1957, had received such an allowance in 1956 and did not consider the availability of a promotional allowance from Flotill in determining whether to promote Flotill items, and that Flotill was not obligated to make a futile gesture by paying a promotional allowance where there was no consideration and when the payment of such allowance did not result in the increased promotion of its products.

Petitioners attack the findings supporting the second 2(d) violation by asserting (a) that it had no obligation to pay equivalent allowances for promotion in a local area to customers who choose to purchase in different markets thousands of miles apart; (b) that it had no way of knowing the ultimate destination of the goods purchased in the California Street market and hence is not chargeable with knowledge that the goods would be sold in competition with those sold by Flotill to Elm Farm Foods and Stop & Shop; (c) that in any event the allegedly "disfavored" purchasers were not "direct customers" of Flotill in Boston and thus Flotill was under no obligation to pay them a promotional allowance equivalent to the one paid all customers buying through its Boston broker to promote Flotill products in Boston; (d) that the Commission erred in including Food Center Wholesale Grocers, Inc., in the coverage of the cease and desist order in reliance on the Commission's holding in *Fred Meyer,* Dkt. No. 7492 (March 29, 1963),[3] without reversing the hearing examiner's decision excluding Food Center Wholesale Grocers, Inc. from consideration as a "disfavored" competing customer, and finally (e) that Commission counsel failed to

[3] That order held that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers.

sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did receive such allowances.

First, as to the discrimination between Elm Farm Foods and Stop & Shop in 1956 and 1957, we find substantial evidence on the record as a whole that an offer of a promotional allowance to Stop & Shop would not have been a "futile gesture," as petitioners contend, and that petitioners have not complied with and in fact have misconstrued the provision in the Federal Trade Commission Guides for Allowances and Service, 1 Trade Reg. Rep. § 3980, that a seller make a specific offer of a promotional allowance to meet the "availability" standard of section 2(d).[4] Accordingly, we believe that this portion of the 2(d) order is entitled to enforcement.

Second, the Commission's findings that Flotill knew or should have known that the goods sold to the four "disfavored" customers were intended for sale by the purchasers in the Boston area is supported by substantial evidence. The record shows that though these sales were negotiated in San Francisco, *all were billed and shipped by Flotill to the retailers in the Boston area,* and the testimony of Albert S. Heiser indicates that Flotill knew that it was making sales to the "disfavored" four in the Boston area.

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[4] Section 2(d), 15 U.S.C. § 13(d):

"(d) *Payment for services or facilities for processing or sale.*

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Furthermore, we agree with Chairman Dixon's contention that petitioners were under an obligation to determine whether customers in fact compete, and that "If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious." (R. 89.) Nor can we agree with petitioners' contention that Commission counsel failed to sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did. While we tend to believe that the hearing examiner's determination that "The competitive retail grocery market represented by the Boston area, as used herein, may be loosely defined to include an area within a radius of approximately 25 to 50 miles of the center of Boston," was a little too "loose" to be of much value, the record contains substantial evidence regarding the number and location of the retailers involved, and credible testimony from the grocery buyers of the firms involved, to establish that the six firms were in competition with one another in the Boston area. Further, in defining the requirements of the competitive market definition which must be made to show a violation of section 2(d), we adhere to the statement of Judge Hamley in *Tri-Valley Packing Association* v. *F.T.C.*, 329 F.2d 694, 708 (9th Cir. 1964) that "In our opinion, where a direct customer of a seller, operating solely on a particular function level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition."

We find the treatment of Food Center Wholesale Grocers, Inc., more troubling. After pointing out that the hearing examiner dismissed the charge that Food Center Wholesale should also be viewed as a "disfavored customer," Chairman Dixon went on to state:

> "As a practical matter we see no real need to resolve the factual and legal questions here presented. The Fred Meyer decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (Finding 105 through 110), they will not be adopted as part of the Commission's decision." (R. 92-93.)

We note that the *Fred Meyer* decision is now before this court for review (*Fred Meyer, Inc.* v. *F.T.C.*, No. 18,903), that petitioners contend that earlier decisions of this court hold squarely against the Commission's decision in *Fred Meyer* (Cf. *Tri-Valley Packing Association* v. *F.T.C.*, *supra*, pp. 709-10; *Alhambra Motor Parts* v. *F.T.C.*, 309 F. 2d 213 (9th Cir. 1962)), and that the Commission did not even review the findings regarding Food Center. In light of these facts we consider it improper to include Food Center and other wholesale customers within the scope of the cease and desist order, for, though Chairman

Dixon is correct in stating that petitioners have the same notice of the Commission's position as all other sellers as a result of the *Fred Meyer* decision, not all other sellers are subject to contempt proceedings for violation of that order as Flotill would be if Food Center and other wholesalers were included in the cease and desist order without the hearing examiner's findings on the point even having been reviewed. Although the remedial order is broadly framed and does not make reference to specific customers, we think it best to make clear that on the record in this case, the prohibition shall not be understood to extend to Food Center and other wholesalers.

III—*Scope of the Order.*

Petitioners direct two attacks against the drafting of the final order of the Commission. First, that it must be limited to the corporation and not extend to the named officers of the corporation, and second, that the order must be limited in scope and definitive in its terms.

In regard to the first ground of attack on the order, we note that the hearing examiner dismissed the complaint as to the Flotill executives in their individual capacities, finding that the corporate organization was stable and not a sham, and that "There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation." (R. 19.) In framing the order to include the individual petitioners, Chairman Dixon relied on no other fact than that the three individuals owned and controlled the corporation. He concluded: "Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt

that an order against the individuals is necessary." (R. 95.)

We find that the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority for such deletion is to be found in *Coro, Inc.* v. *F.T.C.*, 338 F.2d 149 (1st Cir. 1964) and *Rayex Corp.* v. *F.T.C.*, 317 F.2d 290 (2d Cir. 1963).

Petitioners' attack on the scope and particularity of the balance of the final order is largely without merit. A great deal of discretion has been vested in the FTC as to how best to remedy industry abuses, and the Commission is not limited to prohibiting merely the precise acts which have already occurred. *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946); *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962). Accordingly, the rest of the language of the order is held proper.

Enforcement of the order of the Federal Trade Commission is ordered to the extent that the order relates to the section 2(d) violations, with the reference to petitioners in their individual capacities deleted. Enforce-

ment of the order as it relates to the section 2(c) violations is denied. The matter is remanded to the FTC for further proceedings to determine whether a majority of the Commission join in the section 2(c) findings.

HAMLEY, Circuit Judge (Dissenting in Part):

I dissent from that part of the majority opinion which holds that at least three members of respondent Commission must affirmatively vote for an order, and since this requirement was not met with regard to the section 2(c) violation, that part of the proceedings must be remanded.

I think it is too late in the day to raise this question. The Commission rule (16 C.F.R. 1.7) providing that a majority of the members of the Commission constitutes a quorum for the transaction of business, has been in effect for forty years. The reasonable construction of that rule is that a majority of the quorum would be sufficient to render a decision. It has been so construed by the Commission for a very long time. Congress has not seen fit to negate that construction by enacting legislation expressly prohibiting the Commission from acting through a majority of a three-member quorum.

I concur in the remainder of the majority opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Petition, Appendix B, 2a–22a) is reported at 352 F. 2d 847. The opinion and order of the Federal Trade Commission (R. 38–72) [1] and the dissenting opinion of Commissioner Elman (R. 73–77) have not been officially reported.

JURISDICTION

The order of the court of appeals affirming the Commission's order was entered on October 22, 1965 (Petition, Appendix C, 23a), and the final decree enforcing that order was entered on November 15, 1965 (Petition, Appendix D, 24a–25a). The petition

[1] "R." refers to the printed joint appendix filed in the court of appeals.

for a writ of certiorari was filed on January 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the costs of internal redistribution from the central warehouse of a purchasing warehouse distributor to its branch warehouses can negate a *prima facie* showing of injury to competition in a price discrimination case.

2. Whether substantial evidence supports the Commission's finding that jobbers, who are the customers of warehouse distributors, are for purposes of Section 2(a) of the Clayton Act "indirect purchasers" from Purolator.

3. Whether petitioner's discriminatory prices can be cost justified by the differences in price petitioner elects to charge rather than by the "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which petitioner's filters are "sold or delivered."

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and

where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

STATEMENT

Purolator Products, Inc. ("Purolator") manufactures and sells filters, including automobile filters for the replacement market (R. 98-99). In 1957 its sales in this market exceeded $5,000,000 (R. 100) and its share of the market was between 30 and 32 per cent (R. 188).

In 1960 the Federal Trade Commission issued a complaint charging that Purolator had discriminated in price between competing purchasers of its replacement filters, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a) (R. 1–5). The basic facts were stipulated (R. 98–125), and are not in dispute here.

Purolator sells its filters only to warehouse distributors. Warehouse distributors resell substantial quantities of filters to jobbers, to dealers and to fleets. Jobbers resell to dealers and to fleets, and dealers resell only to automobile owners (R. 100).

For pricing purposes, as will be seen later, Puro-

lator distinguishes between warehouse distributors with single warehouses and those with "branch locations" or "branch warehouses." In this connection a clarification of terms is necessary. It was stipulated that warehouse distributors resell filters "either from a central warehouse location or through branch locations, called by respondent 'jobber branches,' which are owned and controlled by, or which own or control, the warehouse distributor * * *" (R. 100). Throughout this proceeding, until Purolator filed its brief in the court of appeals, all parties concerned, including Purolator, understood that the branches were in fact "branch warehouses" or "branch locations."[2] In its brief in the court of appeals, and in its petition here, petitioner referred throughout to these branches as "affiliated jobbers," and the court of appeals also used that term. The nomenclature used, however, is of little consequence because branches of warehouse distributors, like central warehouses and warehouse distributors without branches, all resell substantial numbers of filters to jobbers, to dealers, and to fleets (R. 100, 122). We refer to these branches in the terms that we believe accurately describe their functions, *i.e.*, "branch warehouses" or "branch locations."

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[2] See, *e.g.*, stipulation, R. 100, 102, 107, 109, 110, 111; Commission Exhibits 1 (R. 824), 2 (R. 831), 15 (R. 865–867) (documents prepared by petitioner in its regular course of business); questions posed by Purolator's counsel to witnesses, R. 143, 225, 226, 238, 239, 250–252, 356, 358, 413, 439, 494, 495, 520; majority opinion of the Commission, R. 40, 41, 43, 44, 72; dissenting opinion of Commissioner Elman, R. 75, 76; petition for review, R. 80, 81, 83.

It was stipulated that warehouse distributors without branches compete with the central and branch locations of warehouse distributors with branches in sales to jobbers, dealers and fleets. It was also stipulated that jobbers compete with warehouse distributors without branches and with the central and branch locations of warehouse distributors with branches in sales to dealers and fleets. It was stipulated that this competition is substantial (R. 101–102).[3]

Purolator suggests resale prices of its filters at all levels of distribution (R. 119), and it was stipulated that as a general rule "warehouse distributors, jobbers and dealers sell at the resale prices suggested by [Purolator]" (R. 120). In carrying out its policy of maintaining suggested resale prices the majority of the warehouse distributors are required, before becoming eligible for certain discounts on sales to jobbers, to submit monthly reports showing sales based on Purolator's suggested resale prices to jobbers. The records of warehouse distributors that do not make

[3] Warehouse distributors and jobbers stock a large variety of automobile replacement parts. It was stipulated that warehouse distributors "carry large inventories of such parts, very often numbering from 20,000 to 45,000 different items and jobbers carry somewhat smaller inventories, usually 5,000 different items" (R. 123).

It was also stipulated that many warehouse distributors with branches resell a "substantial portion" of Purolator's filters "to dealers, either through their central warehouse location or through such branch locations" (R. 100). And Purolator's Assistant General Sales Manager conceded that the "vast bulk" of the warehouse distributors with branches "sell to both jobbers and dealers" (R. 554–555).

monthly reports are subject to periodic checks by respondent's auditors (R. 119). Respondent maintains a staff of about 80 employees, referred to as "jobber salesmen," who take orders for respondent's filters from jobbers for transmittal to warehouse distributors. These field men "frequently make attempts to encourage adherence to respondent's published suggested resale prices by direct, personal verbal contact with the jobber or dealer reselling at less than those suggested prices" (R. 120).

Petitioner's price structure is complex, and can best be described, as has been done throughout this proceeding, by relating discounts to a filter which a dealer sells to the automobile owner for $1.00. On such a filter the dealer receives a discount of 45 per cent from the retail price, and pays his supplier, whether a jobber or a warehouse distributor with or without branches, 55 cents for the filter ($1.00 —45% of $1.00). Jobbers and fleets receive a discount of 60 percent from the retail price, and pay the warehouse distributor with or without branches 40 cents for the filter ($1.00 —60% of $1.00) (R. 103). All discounts to warehouse distributors are taken from the 40 cents price the jobber pays, and are as follows:

(1) All warehouse distributors with or without branches receive initially from Purolator a 5 percent discount from the jobber price. This is the only discount received by warehouse distributors without branches on filters resold to dealers, which results in

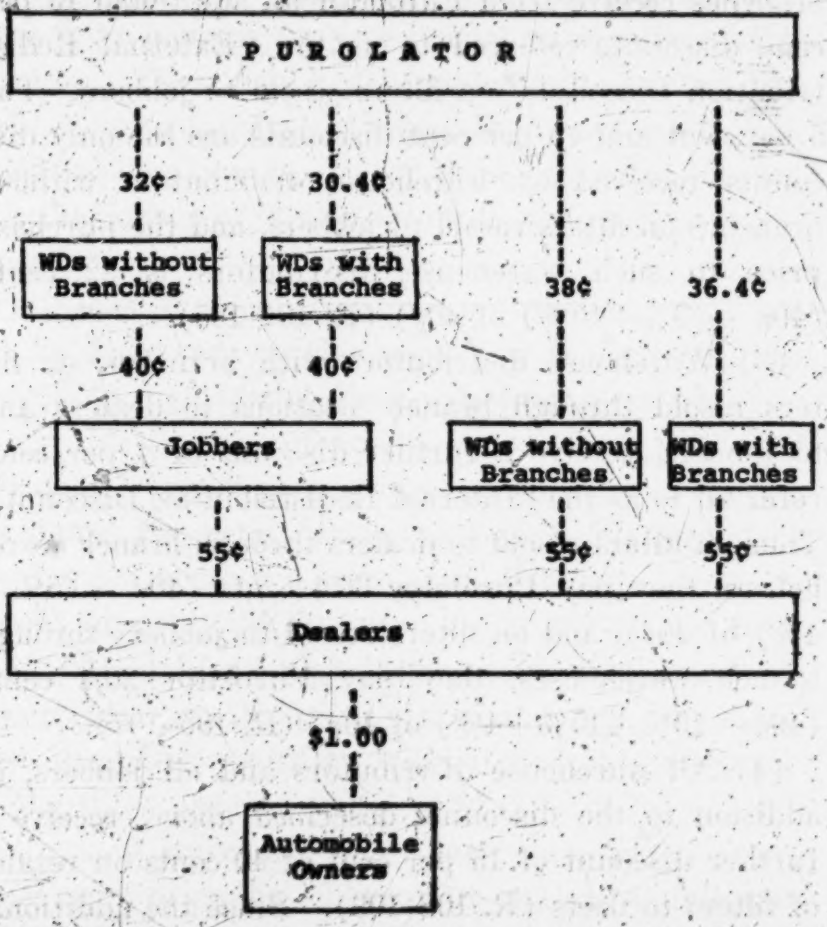
a purchase price to such warehouse distributors of 38 cents (40¢ —5% of 40¢) (R. 103–104).

(2) All warehouse distributors with or without branches receive from Purolator an additional 15 per cent discount, referred to as the "External Redistribution Discount," on filters resold to jobbers. The 5 per cent and 15 per cent discounts are the only discounts received by warehouse distributors without branches on filters resold to jobbers, and the purchase price to such warehouse distributors is 32 cents (40¢ —(5%+15%) of 40¢) (R. 104–105).

(3) Warehouse distributors with branches, on filters resold through branch locations to dealers and to jobbers, receive a further discount of 4 per cent, referred to as the "Internal Redistribution Discount." Thus on filters resold to dealers through branch warehouses, they pay Purolator 36.4 cents (40¢ —(5%+4%) of 40¢), and on filters resold to jobbers through branch warehouses, they pay Purolator 30.4 cents (40¢ —(5%+15%+4%) of 40¢) (R. 106–107).

(4) All warehouse distributors and all jobbers, in addition to the discounts described above, receive a further discount of 15 per cent of 40 cents on resales of filters to fleets (R. 108–109). Since the additional discount is the same (15 per cent in both cases) no issue is raised by resales to fleets that is not raised by resales to dealers, and fleets will not be discussed further in this brief.

The following chart shows graphically the differences in price paid for Purolator's filters by competing purchasers, with the exception of sales to fleets:



The Commission found[4] that the above-described differences in price charged by Purolator to purchasers competing in the resale of filters at the same

[4] At the time of the Commission's decision, April 3, 1964, there was a vacancy on the Commission. Commissioner Dixon wrote the majority opinion, which was concurred in by Commissioner MacIntyre (R. 39–72). Commissioner Elman dissented (R. 73–77), and Commissioner Reilly did not participate (R. 70). See n. 9, *infra*, p. 22.

levels of distribution constituted price discriminations within the meaning of the Act (R. 44–45). It found that because of high costs and low profit margins (3 to 4 per cent), the discriminations were neither "insignificant," "trivial" nor *"de minimis,"* and that their effect "may be substantially to injure competition" (R. 45–50). The discriminations found to be illegal under the above facts are as follows:

(1) *Discriminations between warehouse distributors without branches and warehouse distributors with branches on filters resold to jobbers and dealers.* Warehouse distributors with branches, on filters resold to jobbers through branch outlets for 40 cents, pay 30.4 cents, while warehouse distributors without branches pay 32 cents for the same filters similarly resold. The discrimination in favor of warehouse distributors with branches is 1.6 cents, 5 percent of the price paid by warehouse distributors without branches (5% of 32¢=1.6¢). Where warehouse distributors function as jobbers in reselling to dealers for 55 cents, those selling through branch warehouses pay 36.4 cents while those without branches pay 38 cents, resulting, again, in a discount of 1.6 cents in favor of warehouse distributors with branches, about 4.2 percent of the price paid by warehouse distributors without branches (4.2% of 38¢=1.6¢).

The Commission held that the cost of redistributing filters from the central warehouse to branch warehouses was irrelevant to the question of injury caused by these discriminations in price, and that proof of such costs could not serve to rebut the *prima facie* showing of adverse competitive effects (R. 50–

52). (Noting that "warehouse distributors who maintain a central warehouse and reship to branches operate in this manner for reasons of efficiency, convenience, and economy" (R. 51), the Commission held that the discriminations in price are not "excused by proof that the buyer receiving the more favorable price has higher internal expenses than his competitor" (R. 52).

(2) *Discriminations between jobbers and warehouse distributors with and without branches on filters resold to dealers.* As stated, warehouse distributors with branches, on filters resold to dealers through branch outlets, pay Purolator 36.4 cents, and warehouse distributors without branches pay Purolator 38 cents. Jobbers pay 40 cents to their suppliers for such filters, which they resell to dealers in competition with such warehouse distributors for 55 cents. This results in discriminations in favor of warehouse distributors of 3.6 cents and 2 cents, respectively, which amounts to 9 percent and 5 percent of the price paid by jobbers (9% of 40¢=3.6¢; 5% of 40¢=2¢).

In connection with the discriminations between warehouse distributors and jobbers, the Commission held that jobbers, although they are customers of warehouse distributors, are "purchasers" from Purolator within the meaning of Section 2(a). In so holding it applied the "indirect purchaser" doctrine enunciated by the Commission, and approved by the courts, in many prior cases (R. 53–56). The Commission made detailed findings as to the control exercised by Purolator over the prices to jobbers, and over other terms and conditions of sale under which

jobbers purchase from warehouse distributors. It discussed the many "direct contacts" between Purolator and jobbers (R. 56–62). It concluded that Purolator exercised "control over the distributor-jobber relationship to such an extent that the jobbers effectively were [Purolator's] customers rather than the distributors' and, for the purpose of the Robinson-Patman Act, [Purolator] is thus chargeable with the competitive effects of distributors' prices to jobbers" (R. 62).

The Commission rejected Purolator's contention that the price differentials between warehouse distributors and jobbers on filters resold to dealers were cost justified under the proviso of Section 2(a), by reason of the fact that Purolator charged warehouse distributors reselling to jobbers 6 cents less per filter than it charged warehouse distributors who compete with jobbers in reselling to dealers. The Commission noted that Purolator offered no evidence as to higher costs incurred in "manufacturing, selling, and delivering" filters to warehouse distributors for resale directly to dealers, and held that Purolator had not met its burden of proving a valid cost justification defense by showing only the differences in prices which it "chooses to charge" distributors (R. 62–64).

In addition to the contested violations of Section 2(a) found by the Commission and discussed above, Purolator stipulated that it had violated the Act by discriminating in favor of one warehouse distributor, designated in the stipulation as "warehouse distributor A." This warehouse distributor was granted the full external redistribution discount (15 per cent) on filters it resold directly to dealers. It paid 32 cents

for filters resold to dealers while competing warehouse distributors paid 38 cents and jobbers paid 40 cents for filters similarly resold. It was stipulated that this discrimination had the adverse effects on competition proscribed by the statute, and it was conceded that an appropriate order to cease and desist could be entered (R. 110–113). Thus, the issues raised by the petition can only affect the question of whether the Commission's cease and desist order properly includes a prohibition against the discriminations challenged in this Court.

The court of appeals held that all of the Commission's findings of fact were supported by substantial evidence, and affirmed the Commission's decision in its entirety. The questions raised by the petition relate to (1) whether the 4 per cent internal redistribution discount granted warehouse distributors on sales through branch warehouses has the probable effect of injuring competition, (2) whether jobbers are purchasers from Purolator within the meaning of Section 2(a) of the Clayton Act, and (3) whether the lower price paid by warehouse distributors on resales to dealers in competition with jobbers was shown to be cost justified within the meaning of the proviso of Section 2(a).

ARGUMENT

1. On the basis of the record the Commission found that the business of selling automobile replacement parts at all levels of distribution is "keenly competitive," and is characterized by "relatively high costs" resulting in net profit margins of "between

3% and 4%" (R. 45). It found that the price discriminations practiced by Purolator, the least of which is greater than the normal profit margin, are substantial, and that the "potential effect" of the discriminations on competition is revealed by the fact that the 2 per cent cash discount prevalent in the industry "is considered by warehouse distributors and jobbers alike to be important and even essential to a profitable business" (R. 48). On the basis of these facts the Commission concluded that "a prima facie case of competitive injury" had been shown, and that the effect of the discriminations "may be substantially to injure competition" (R. 49). The court of appeals agreed.

These findings of adverse competitive effects do not result from the application of a "mechanical formula" or from "push button" enforcement, as contended by Purolator (Petition, 13–14); they derive from the exercise of common sense. Potential injury frequently and with sound reason has been inferred from substantial price discriminations practiced in keenly competitive markets characterized by narrow profit margins. See, *e.g.*, *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 154–155 (C.A. 7), *certiorari denied*, 355 U.S. 941; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 254–255 (C.A. 7), *certiorari denied*, 353 U.S. 938. And no further evidence of injury is necessary, for "[i]t would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely that

there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50–51.

Purolator contends, however, that warehouse distributors without branches were not injured by the 4 per cent internal redistribution discount granted warehouse distributors with branches on filters resold through branch outlets (Petition, 9–12). It offered in evidence cost studies showing that the cost to warehouse distributors of redistributing filters to their branch outlets was in excess of the 4 per cent price advantage they received. This evidence was not designed to present a cost justification defense, permitted by the proviso to Section 2(a), but was intended to negate the *prima facie* showing of injury to warehouse distributors without branch warehouses.

The hearing examiner (R. 32–33), the Commission (R. 50–52), and the court of appeals (Petition, Appendix B, 12a–13a) rejected this evidence as being irrelevant to the issue of competitive injury.[5] This

[5] Purolator contends (Petition, 14–15) that the rejection of this evidence constituted a denial of a fair hearing, the theory being that if customers' costs are relevant to show competitive injury they are also relevant to show a lack of competitive injury. But, as shown, the Commission's findings of adverse effects on competition rested on stipulated facts that the business of distributing automobile parts is keenly competitive, that costs of doing business are relatively high, and that profit margins are very low. The offered evidence could not possibly

ruling plainly was correct. Warehouse distributors without branches and warehouse distributors maintaining branch warehouses perform exactly the same distributive functions; they compete in the sale of filters to jobbers, to dealers and to fleets. The Commission found that warehouse distributors who sell through branch outlets do so "for reasons of efficiency, convenience, and economy," and that "warehouse distributors who operate branches and reship would not cease to operate in this manner even if [Purolator's] four percent internal redistribution discount were discontinued" (R. 51). The Commission clearly was justified in concluding that Purolator's 4 per cent discriminatory price may not "be excused by proof that the buyer receiving the more favorable price has higher internal expenses than his competitor" (R. 52). As the court of appeals held (Petition, Appendix B, 13a):

> Companies competing in the same line may experience different costs, and if those costs are a result of the company's method of operation, evidence that a seller helped some of its customers defray those costs while it did not help others is not relevant to disprove competitive injury. Such evidence only tends to show that some WDs have costs peculiar to their manner of doing business; it does not show nor could

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rebut these facts; it would show only that some customers, because of their method of selling, had costs not incurred by others. As the court of appeals held, the Commission's evidence "clearly goes to the question of competitive injury," while Purolator's offered evidence was not of "the same type * * *" (Petition, Appendix B, 13a).

it show that competitors of these WDs would not be injured if some of those costs are paid by Purolator.

Moreover, even if the advantages of the 4 per cent discriminatory discount are more than offset by the costs of transacting business through branch warehouses, injury is still apparent. If internal redistribution is an inefficient method of operation, the more efficient warehouse distributors are entitled to the benefits of their business acumen; they should not be required to compete against the subsidization of inefficiency. The injury caused by the price discrimination would be the same as if the favored and non-favored warehouse distributors were equally efficient.

2. Warehouse distributors and jobbers, as shown, perform the identical functions of stocking and selling filters to dealers at the same price. Warehouse distributors purchase directly from Purolator, while jobbers purchase from warehouse distributors. The Commission held that because of the control Purolator exercises over the prices and terms at which jobbers purchase filters, jobbers are "purchasers" from Purolator within the meaning of Section 2(a). The court of appeals affirmed, holding that the long-established "indirect purchaser" doctrine is sound in the factual setting here. It stated the rule as follows (Petition, Appendix B, 16a):

> If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller.

> If the seller controls the sale, he is responsible for the discrimination in the sales price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

The Commission first applied the indirect purchaser doctrine in 1937, one year after the enactment of the Robinson-Patman Act, in *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537, 546, where it held:

> A retailer who purchases respondent's goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that respondent recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.

The Commission has never deviated from this interpretation of the statute, and has applied the indirect purchaser doctrine, where the facts warrant, in many cases.* Surely, this "consistent administrative con-

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*See, *e.g.*, *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537; *Luzor, Ltd.*, 31 F.T.C. 658; *Dentists' Supply Co.*, 37 F.T.C. 345, *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *E. Edelmann & Co.*, 51 F.T.C. 978, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

struction" of a statute committed by Congress to the jurisdiction of the Commission for enforcement "is entitled to great weight." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391. Moreover, the courts consistently have sustained the Commission's application of the doctrine in several cases. *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109–110 (C.A. 2), *certiorari denied*, 371 U.S. 824; *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2), *certiorari denied*, 331 U.S. 806. *Cf, Monroe Auto Equipment Company* v. *Federal Trade Commission*, 347 F. 2d 401, 403–404 (C.A. 7), *certiorari denied*, 382 U.S. 1009; *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310, 312 (S.D. N.Y.). In *American News* the Second Circuit concisely stated the rule (300 F. 2d at 109):

> If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys.

The facts here fall squarely within the rule approved in the above decisions. The Commission discussed in detail the relationship between Purolator and jobbers (R. 56–62). It found that Purolator controls the prices at which jobbers purchase from warehouse distributors (R. 58); that it requires warehouse distributors to enter into contracts with jobbers, prepared and approved by Purolator (R. 61), under which jobbers must agree to maintain a $500 inven-

tory of Purolator's products (R. 56) and to purchase their entire requirements from the warehouse distributor with whom the jobber signs the contract (R. 57); that in order to be entitled to the external redistribution discount, warehouse distributors must either make monthly reports showing sales to jobbers at suggested prices or subject their records to inspection by Purolator in order to verify sales volume representations (R. 58); that Purolator polices resale prices at all levels (R. 60); that its salesmen solicit orders directly from jobbers and turn them over to warehouse distributors for processing (R. 62); that Purolator "dropped shipped" filters to jobbers at the request of warehouse distributors (R. 62); that it mailed directly to the jobbers price lists and advertising materials (R. 62). In short, the Commission concluded that "the evidence reveals that [Purolator] has, in effect, established the prices at which the jobbers purchase from the warehouse distributors and controls the terms under which the purchases are consummated" (R. 62).

Thus Purolator is directly responsible for the disadvantageous prices at which jobbers must purchase and for the adverse effect of the discriminations on jobber competition with warehouse distributors. Under the consistent administrative precedent and the judicial authority cited above, jobbers are "purchasers" from Purolator for the purposes of Section 2(a) of the Clayton Act.

3. Purolator contended before the Commission and the court of appeals that the lower prices paid by

warehouse distributors for filters resold to dealers (38 cents and 36.4 cents) as compared with the price paid by jobbers for such filters (40 cents), resulting in discriminations in favor of warehouse distributors of 2 cents and 3.6 cents, were more than justified by differences in costs of sale. The argument was that because Purolator charged warehouse distributors 6 cents less for filters resold to jobbers than it charged warehouse distributors for filters resold to dealers, the 2 cent and 3.6 cent discriminations in prices between warehouse distributors and jobbers were cost justified (see Commission Opinion, R. 62–64). Purolator contended that the different prices it chose to charge, without more, constituted a justification for the differences in price.

In rejecting this strange purported cost justification defense, the Commission noted that Purolator had "offered no evidence on the different costs incurred by it in manufacturing, selling, and delivering" filters to warehouse distributors for sale directly to dealers (R. 64); in other words, no comparative costs were presented on sales to favored and disfavored purchasers. The Commission held that having before it "only evidence of the prices which [Purolator] chooses to charge rather than evidence of the costs incurred," it had "no basis for making a cost comparison" and could not conclude that Purolator's different prices were cost justified (R. 64). The court of appeals affirmed.

Purolator in this Court has deviated from the argument it made below. It now contends (Petition, 19–

21) that warehouse distributors are its "agents" in reselling filters to jobbers, and that the 6 cent internal redistribution discount to such warehouse distributors was in fact a "commission" paid to its "agents." Plainly, however, warehouse distributors are direct purchasers from Purolator.[7] But even if they did act as Purolator's agents in reselling to jobbers, the deficiencies of the cost justification contention would still be apparent because Purolator offered no evidence of its costs of sales to warehouse distributors and to jobbers.[8] The court of appeals correctly evaluated Purolator's cost justification defense, as follows (Petition, Appendix B, 18a):

> Subsection (b) of Section 2 of the Act places the burden of rebutting a prima facie case of price discrimination by showing a justification upon the person charged with violation of the

[7] Contracts executed between Purolator and warehouse distributors are contracts of sale (Commission Exhibits 1, 2, 3, R. 824–839), and numerous officials of purchasing warehouse distributors testified that they are not agents of Purolator (R. 849, 493, 519, 566, 590, 631, 657, 672, 692). If warehouse distributors were Purolator's agents in sales to jobbers, jobbers would be direct purchasers from Purolator instead of "indirect purchasers."

[8] *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, and *Thomasville Chair Company* v. *Federal Trade Commission*, 306 F. 2d 541 (C.A. 5), have no bearing on this case. Each of those cases arose under Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(c), and the question in each was whether illegal brokerage, or allowances in lieu thereof, had been passed on to the buyer. The question here is whether Purolator has discriminated in price within the meaning of Section 2(a), and, if it has, whether it has presented a valid cost justification defense on this phase of the case.

section. Although Purolator had the opportunity at the hearing before Commission of offering evidence as to its difference in costs of manufacture, sale, or delivery to different purchasers as contemplated by the Act, it failed to do so. Instead, it offered only evidence of its prices.

CONCLUSION

The decision of the court of appeals is correct. There is no conflict among the circuits, and the decision below accords with the pertinent administrative and judicial precedents. There is accordingly no occasion for further review. The petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

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I authorize the filing of the foregoing brief in opposition. I shall shortly file a memorandum setting forth the views of the United States in this case.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966

[9] On April 1, 1966, Purolator filed a motion in this Court for leave to amend its petition for a writ of certiorari in order to raise the question of whether the Commission's decision was invalid because it was issued by less than a majority of the authorized members of the Commission. As stated (*supra*, n. 4), only three Commissioners (a quorum under the Commission's rule, 16 C.F.R. 1.7), participated in the decision and

the vote was 2 to 1. Purolator's motion relies primarily on the Ninth Circuit's decision in *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (decided March 16, 1966, printed as an apppendix to Purolator's motion, 1a–18a), which held that the Commission can act only through a majority of its authorized members, and on the conflict between the decision of the Ninth Circuit in *Flotill Products* and the decision of the Sixth Circuit in *Atlantic Refining Company* v. *Federal Trade Commission*, 344 F. 2d 599, 607, *certiorari denied*, 382 U.S. 939. Purolator did not raise this question below.

On June 20, 1966, the Court of Appeals for the Ninth Circuit granted the Commission's petition for rehearing in *Flotill Products*, and has set argument for August 2, 1966, before the court sitting *en banc*. Thus there is no outstanding conflict between the circuits.

The identical question has been raised and is now pending in two other courts of appeals, *Luria Brothers and Company* and 14 related cases (C.A. 3, No. 14,402, argued January 21, 1966), and *Emile M. Lapeyre, et al.* (C.A. 5, No. 21,787, argued April 19, 1966). The Commission believes that this question should not be considered in this case, where the point was neither raised before nor decided by the court of appeals. Resolution of the question, if a conflict develops, should await review of a case where it was raised below, such as one of the cases cited above. Purolator's motion to amend its petition to include the question should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General has authorized the Federal Trade Commission to file a brief in opposition to the granting of the petition for a writ of certiorari in this case. While the United States agrees with the Commission that the petition should be denied as to part of the case, it believes that the Commission's disposition of one aspect of this proceeding is erroneous and, unless reversed, may well adversely affect the proper administration of the Robinson-Patman Act. We believe that the petition should be granted to resolve these issues.

STATEMENT

The Federal Trade Commission brought this proceeding under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), charging petitioner ("Purolator") with practicing illegal price discrimination among certain classes of customers in the distribution system through which Purolator's merchandise reaches the consumer. Section 2(a) makes it unlawful "for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition."

Purolator manufactures automobile replacement filters for oil, air and gasoline. These filters are sold to the general public through a chain of distribution which ordinarily involves, in turn, warehouse distributors, jobbers and dealers.[1] The most common means by which a filter reaches an automobile owner is for Purolator to sell the filter to a warehouse distributor, who in turn sells it to a jobber, who sells it to a dealer, who, finally, sells to the consumer. See diagram, p. 5, *infra*. This ordinary chain, however, is varied in some instances, and it is these variations—and the

[1] Filters are sold to fleets of automobiles at lower rates through a somewhat different chain of distribution, which eliminates retail dealers. Since fleet sales raise no issues in this case not raised by sales to the general public through retail dealers, fleet sales will not be discussed in this memorandum.

price differentials which accompany them—which are the subject of the present litigation.

The variations in Purolator's distribution system affect the warehouse distributor and jobber stages in the chain. One variation occurs when, in some instances, the independent jobber stage is eliminated by a warehouse distributor who sells some filters directly to a nearby dealer. See diagram, p. 7, *infra*. By far the most important variations occur, however, not because particular entities in the distribution chain are bypassed, but because of vertical integration among some of the warehouse distributors and jobbers who deal in Purolator's products. While most of Purolator's warehouse distributors and jobbers are independently owned, some jobbers are either owned by—or own—the warehouse distributor from whom they obtain filters, thus forming what the Commission has treated as a single, integrated warehouse-distributor-jobber entity; these entities have been referred to below, and in the Commission's brief in opposition, as warehouse distributors "with branches." These integrated entities perform essentially the same function as is performed by independent warehouse distributors and independent jobbers, and they perform it in a similar manner. They buy filters from Purolator and distribute them to dealers, first through a central warehouse equivalent to the facilities of an independent warehouse distributor, and then through smaller "branch" warehouses equivalent to the facili-

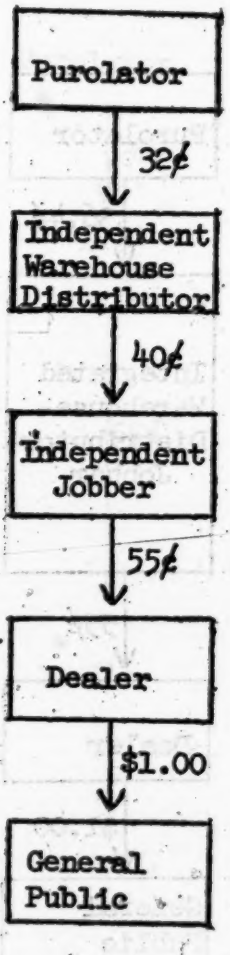
ties of independent jobbers. See diagram, p. 6, *infra*. In addition, in some relatively rare instances, the integrated entity sells a filter, not directly to a dealer, but to an independent jobber who then sells to a dealer. See diagram, p. 8, *infra*.

Purolator's price structure for these various methods of distribution is described in detail in the court of appeals' opinion (Petitioner's Appendix B, pp. 5a–7a) and in the Commission's opinion (Record, pp. 39–42). Prices at all levels of distribution are involved, for while Purolator sells directly only to integrated and independent warehouse distributors, it suggests and maintains resale prices to jobbers, retail dealers, and to final consumers. Based upon an ultimate suggested consumer price of $1.00, Purolator suggests that filters be sold to all independent jobbers for 40 cents and to all retail dealers for 55 cents. Purolator's own prices to warehouse distributors vary with the method of distribution involved and are as follows:

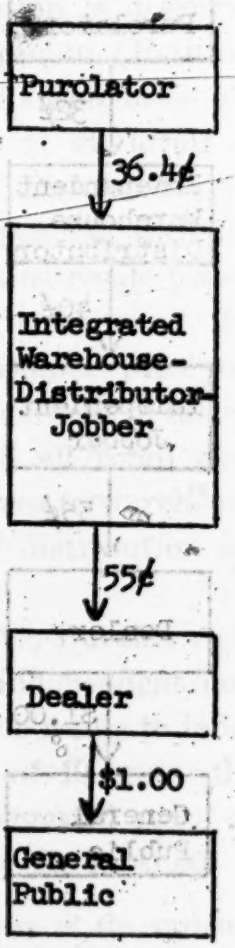
(1) As noted above, Purolator sells the vast majority[2] of its filters to independent, non-integrated, warehouse distributors for resale to independent jobbers at the suggested price of 40 cents; the jobbers then sell to dealers at the suggested price of 55 cents and the dealers sell to the public at $1.00. Purolator charges

[2] The relative frequency of the various types of distribution for Purolator filters is indicated by Commission Exhibit 21, R. 880–891; see also R. 971–972.

independent warehouse distributors 32 cents on these sales. Schematically, this form of distribution, which is free of any vertical integration, may be represented as follows:



(2) In the next most common form of distribution, Purolator sells filters to vertically integrated warehouse-distributor-jobbers for resale to dealers at 55 cents. Purolator charges the integrated entities 36.4 cents on such sales. These sales may be represented as follows:



(3) On the relatively few filters resold directly by independent warehouse distributors to retail dealers at 55 cents—thus by-passing the jobber stage of distribution—Purolator charges the warehouse distributor 38 cents:

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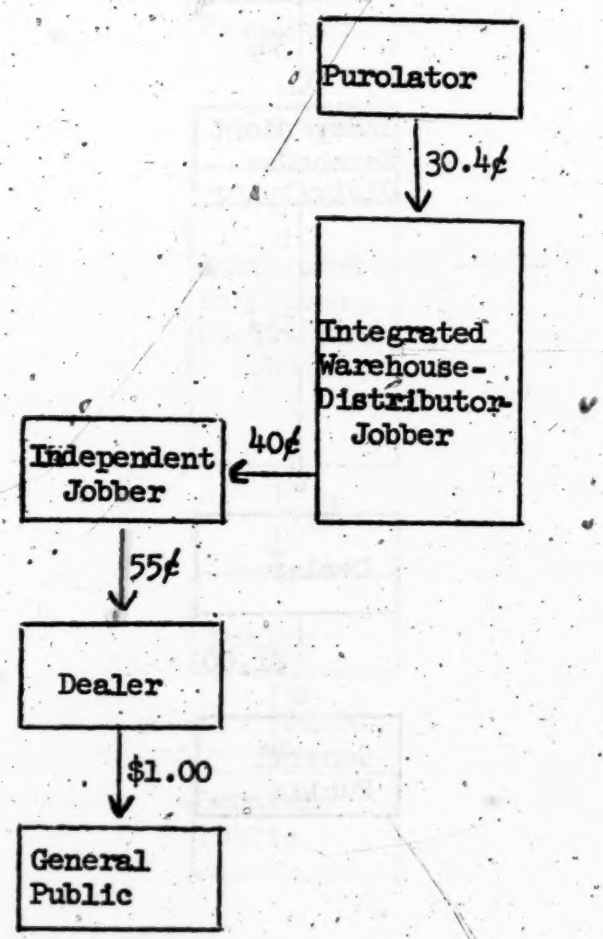
(4) A small number of filters are also sold by Purolator to integrated warehouse-distributor-jobbers who then sell them to independent jobbers at 40 cents for sale to dealers at 55 cents. A filter that is the subject of this complex and relatively unusual distribution arrangement is sold by Purolator to the integrated entity for 30.4 cents:



Based upon these facts, the Commission found three separate violations of the Robinson-Patman Act in Purolator's pricing policies:

(a) It was stipulated that, while warehouse distributors ordinarily paid Purolator 38 cents for filters sold directly to dealers at 55 cents (see ¶ (3), p. 7, *supra*), one warehouse distributor paid Purolator only 32 cents for such filters (R. 110–113). Purolator admitted before the Commission and the court of appeals that this favored treatment constituted a violation of the Act. Petitioner does not now challenge the propriety of a cease-and-desist order on this aspect of the case and we shall omit it from further discussion.

(b) As noted above (compare ¶ (1), *supra*, pp. 4–5, with ¶ (4), *supra*, p. 8, independent warehouse distributors buying filters sold to independent jobbers at 40 cents—the most frequent chain of distribution of Purolator products—pay 32 cents for such filters, but integrated warehouse-distributor-jobbers pay 30.4 cents in the rare instances where they also sell filters to independent jobbers rather than to dealers directly. Thus, an integrated entity has a higher mark-up on a sale to an independent jobber than does an independent warehouse when it sells to a jobber (9.6 cents as opposed to 8 cents). Similarly (compare ¶ (2), supra, p. 6, with ¶ (3), *supra*, p. 7), an integrated warehouse-distributor-jobber pays 36.4 cents for a filter sold by it to a dealer for 55 cents—the normal course of distribution for an integrated entity—while an independent warehouse distributor, in the relatively rare case when a sale is made directly by such

a warehouse to a dealer, pays a higher price of 38 cents for a filter sold to the dealer at 55 cents. Again the integrated entity has the higher mark-up for the same resale (18.6 cents as opposed to 17 cents). The Commission found that these lower prices to integrated warehouse-distributor-jobbers when they performed the same function as independent warehouses—*i.e.*, reselling filters to dealers or independent jobbers at identical prices of 55 and 40 cents—constituted a discrimination violating the Robinson-Patman Act (R. 43). The court of appeals affirmed this determination (Pet. App. B 22a). The finding is now challenged by petitioner.

(c) Finally, the Commission held that Purolator was practicing illegal price discrimination on filters sold to dealers as between independent jobbers, on the one hand, and independent warehouse distributors and integrated warehouse-distributor-jobbers, on the other. Independent jobbers uniformly pay 40 cents for filters resold to dealers at 55 cents, and thus have a mark-up of 15 cents. Integrated warehouse-distributors, however, pay 36.4 cents for filters sold by them to dealers at 55 cents and thus have a mark-up of 18.6 cents, and independent warehouse distributors pay 38 cents for such filters, with a mark-up of 17 cents, (See ¶¶ (2) and (3), *supra*, pp. 6–7). Thus, independent jobbers pay more for, and have a lower mark-up on, filters sold by them to dealers than do independent warehouse distributors or integrated warehouse-distributor-jobbers when either of those entities sell to dealers.

The Commission recognized that, in thus comparing the price charged by warehouse distributors to independent jobbers who sell to dealers (40 cents) with the prices charged by Purolator to independent and integrated warehouse distributors who sell to dealers (38 cents and 36.4 cents), it was comparing sales by different vendors at distinct levels of distribution—*i.e.*, the warehouse distributors (both independent and integrated) buy from Purolator and the independent jobbers buy, in turn, from warehouse distributors. The Commission, however, applied the so-called "indirect purchaser" doctrine, developed in prior cases, to find that the independent jobbers, like the warehouse distributors, were legally "purchasers" from Purolator even though such jobbers actually bought from intermediate warehouse distributors rather than from Purolator. The Commission found that "the evidence reveals that * * * [Purolator] has, in effect, established the prices at which the jobbers purchase from the warehouse distributors and controls the terms under which the purchases are consummated," and it also reveals "instances of direct contact between * * * [Purolator] and the indirect buying jobbers." The Commission concluded that "the jobbers effectively were * * * [Purolator's] customers rather than the distributors' and, for the purpose of the Robinson-Patman Act, * * * [Purolator] is thus chargeable with the competitive effects of distributors' price to jobbers" (R. 62).

In accord with its finding that all three entities—independent jobbers, independent warehouse distributors, and integrated warehouse-distributor-jobbers—were

legally purchasers from Purolator competing with each other on sales to dealers, the Commission compared the prices paid by these different classes of purchasers. The Commission found that the price differences of 3.6 cents and 2 cents, respectively, between the prices paid to Purolator by warehouse distributors (38 cents and 36.4 cents) and the price paid by independent jobbers to warehouse distributors (40 cents) were sufficiently high in the context of "a highly competitive market with narrow profit margins" to constitute a threat of injury to competition (R. 49). The Commission concluded that a *prima facie* case of a Section 2(a) violation had been established by showing significantly different prices to different "purchasers," and that Purolator had not offered evidence of its own differing costs which would rebut this case (R. 49, 52, 68, 70). The court of appeals affirmed (Pet. App. B 22a). Petitioner urges that this determination also constitutes error.

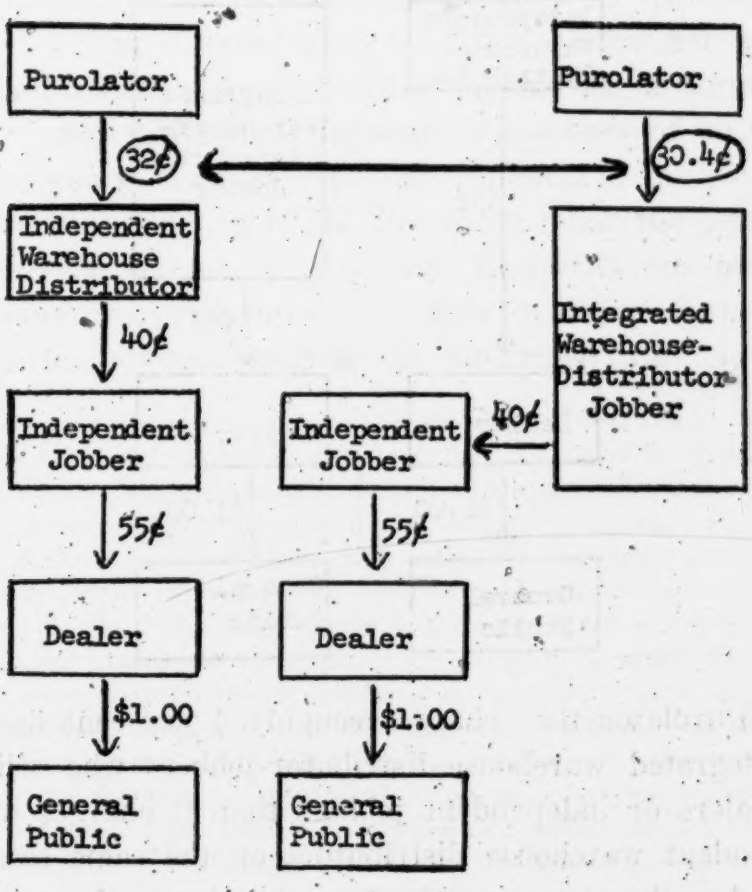
DISCUSSION

We discuss each of the challenged aspects of the Commission's order in turn.

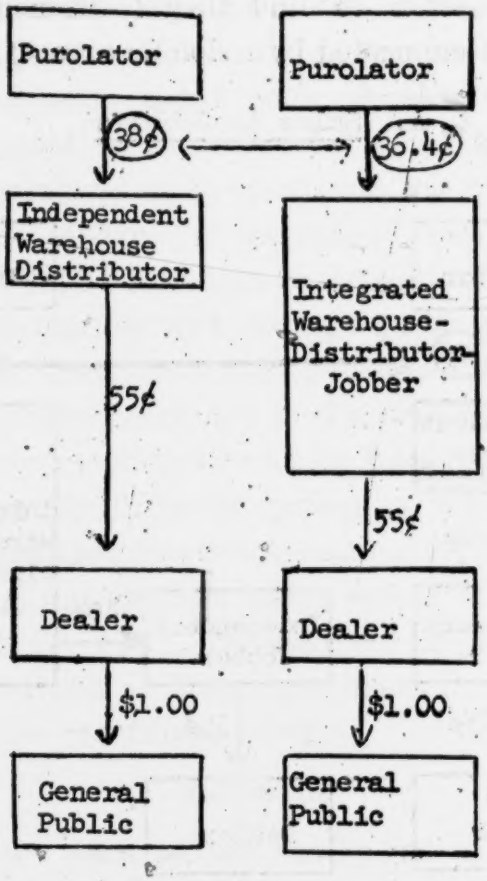
1. The Commission found illegal price discrimination inherent in the fact that Purolator charged higher prices to independent warehouse distributors on sales to jobbers and dealers than it charged to integrated warehouse-distributor-jobbers on similar sales.

The discriminations found are shown in the following diagrams (in each instance the prices compared by the Commission to find illegal discrimination are circled and connected by a double arrow):

A. Sales to Jobbers



B. Sales to Dealers



Purolator thus charges roughly 4 per cent less to integrated warehouse-distributor-jobbers who sell to dealers or independent jobbers than it charges independent warehouse distributors on the same sales—30.4 cents as opposed to 32 cents where sales to jobbers are concerned and 36.4 cents as opposed to 38 cents where sales to dealers are concerned. As far as the record reveals, in each case the integrated ware-

house-distributor-jobber performs the same service in the distribution chain as does the independent warehouse distributor, *i.e.*, each entity distributes the filter either to a retail dealer or to an independent jobber, and each type of warehouse also purchases these filters directly from Purolator.

In these circumstances, we agree with the Commission that a *prima facie* violation of the Act was demonstrated, since Purolator maintained a significant price differential between two classes of customers who performed the same function in the chain of distribution.[3] Nor did Purolator rebut the *prima facie* case against it. In order to justify the price differentials, Purolator presented evidence showing that the internal costs of an integrated warehouse-

[3] It is true that, if integrated warehouse distributors and independent warehouse distributors did not actually compete with each other in these sales (as may be suggested by the fact that in each instance of alleged discrimination, one type of sale was relatively rare and the other relatively common), the discrimination in price may not have injured competition, as required by the Act. Such would be the case if, for example, independent warehouse distributors sold directly to retail dealers only when a retail dealer happened to be located close to the independent warehouse and no integrated warehouse-distributor-jobber attempted to sell to such a retailer. Similarly, this would be the case if integrated warehouse-distributor-jobbers sold to independent jobbers only when two redistributions (one, internally, to the affiliated jobber and the second to the independent jobber) were necessary to supply parts to unusually distant or inaccessible dealers and no independent warehouse distributor attempted to sell to these independent jobbers. Purolator, however, has made no such contentions or demonstration in this case, and such circumstances cannot, in our view, be presumed in the absence of such evidence.

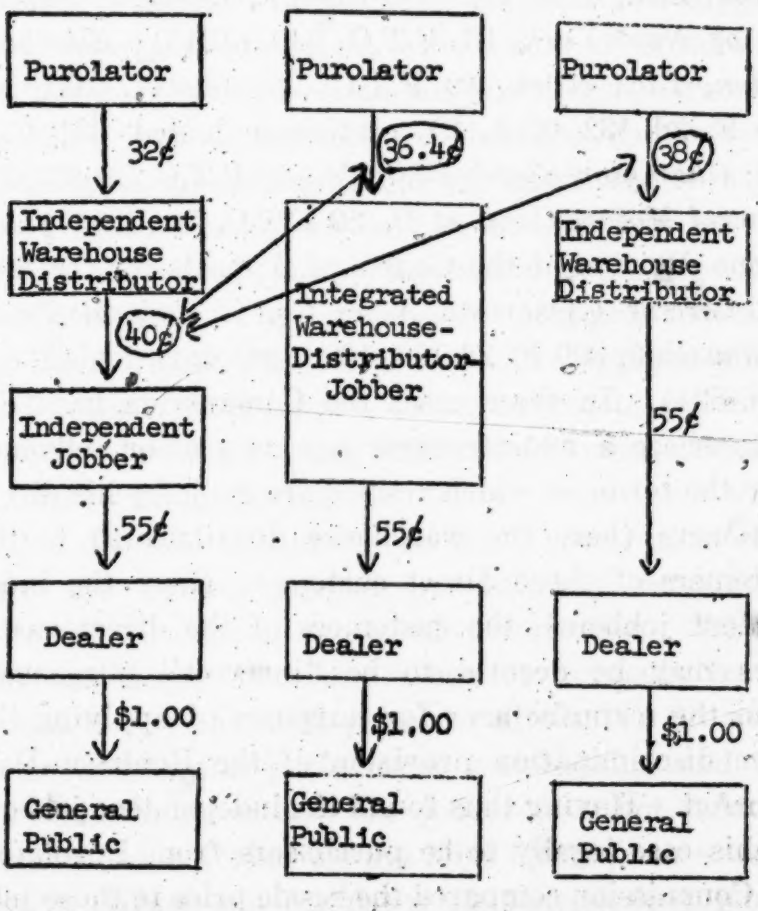
distributor-jobber, when it sold to a retail dealer (or to an independent jobber), were greater than the internal costs of an independent warehouse distributor on the same sales. We believe, however, that evidence of these costs was, as the Commission held, irrelevant. Such evidence, even if it showed that an integrated entity's costs in making distribution to a dealer or independent jobber were more than 4 per cent higher than an independent warehouse distributor's costs for the same function, would merely show that the integrated entity constituted a less efficient means of effecting the particular desired distribution than an independent warehouse. Such a subsidization of inefficient competitors as against efficient ones would in our view constitute no less a price discrimination affecting competition than a system which accords a lower price to one of two equally efficient competitors. Regardless of their efficiency, competitors performing the same function ought to be able to buy at the same price, so long as the seller's costs relating to each are the same.

We therefore believe that there is no occasion for further review of this aspect of the Commission's order.

2. We do, however, disagree with the Commission's disposition of the remaining legal issues in the case, and we believe these issues to be of sufficient importance to warrant review by this Court.

The Commission found illegal price discrimination in the differences between the price on sales by ware-

house distributors to independent jobbers for resale to dealers (40 cents) and the prices charged by Purolator to integrated warehouse-distributor-jobbers and to independent warehouse distributors for resale by those entities to dealers (36.4 cents and 38 cents, respectively). The alleged discriminations are shown schematically in the following diagram, with the prices compared by the Commission to find illegal discrimination enclosed in circles and connected by double arrows:



The Commission thus found illegal discrimination by Purolator through comparing the prices charged *to jobbers by warehouses*—prices suggested and maintained by Purolator—with the prices charged *to warehouses by Purolator* itself. The Commission believed this comparison of prices charged at different levels of distribution to be justified through the application of the so-called "indirect purchaser" doctrine developed in a series of Commission cases (*Kraft-Phenix Cheese Corporation,* 25 F.T.C. 537 (1937); *Luxor, Ltd.,* 31 F.T.C. 658 (1940); *Dentists' Supply Co. of New York,* 37 F.T.C. 345 (1943); *Elizabeth Arden, Inc., et al.,* 39 F.T.C. 288 (1944), affirmed, 156 F. 2d 132 (C.A. 2), certiorari denied, 331 U.S. 806; *Champion Spark Plug Co.,* 50 F.T.C. 30 (1953); *General Motors Corp. et al.,* 50 F.T.C. 54 (1953)) and in one decision of the Courts of Appeals for the Second Circuit (*American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104, 109, certiorari denied, 371 U.S. 824). In these cases the Commission has held that, where a manufacturer has control or influence over the terms at which resales are made by his direct customers (here the warehouse distributors) to the customers of those direct customers (here the independent jobbers), the customers of the direct customers may be deemed to be "indirect" purchasers from the manufacturer for purposes of applying the price discrimination provision of the Robinson-Patman Act. Having thus found the independent jobbers in this case legally to be purchasers from Purolator, the Commission compared the resale price to those job-

bers with the price charged by Purolator to its direct warehouse customers. This price differential was significant in terms of the profit margins in the industry, and the Commission therefore found the existence of *prima facie* price discrimination which it held could be rebutted only by a demonstration by Purolator that its costs were higher in one type of sales than in the other. Such evidence was not present.

While the United States agrees that the "indirect" purchaser doctrine has legitimate application in preventing price discrimination on the part of a supplier who controls resale prices, even where all or some of the purchasers involved do not buy directly from the supplier, it does not believe that the doctrine can properly be invoked as the Commission used it in this case. The doctrine, we believe, should only be used to compare prices paid by purchasers at the *same* level of distribution who presumably perform the same function. Thus, the doctrine would be applicable here if Purolator maintained different resale prices to different jobbers playing relevantly identical roles in the distribution process.

The doctrine should not be used, however, to compare the prices charged by different vendors at different functional levels of distribution. Jobbers and warehouse distributors cannot normally be expected to pay the same price for filters, for the warehouse distributor performs a warehousing and distributing function that the jobber does not perform and, indeed, a jobber always buys filters *from* a warehouse. When one compares an independent jobber

with an integrated entity which acts both as a jobber and a warehouse-distributor, one must thus take into account that the integrated entity not only acts as a jobber, distributing filters to retail dealers, but also acts as a warehouse distributor, receiving the filters from Purolator and distributing them to affiliated jobbers. In the case of an independent jobber, the warehousing and distributing function is performed by the warehouse from which the jobber buys. It is natural, therefore, that the independent jobber pays a higher price than does the integrated entity, for some of the service which an integrated entity performs has already been performed when the jobber purchases from the warehouse. Similar reasoning may also be applicable to differences between the prices charged by Purolator to independent warehouse distributors who sell directly to retail dealers and the prices charged by warehouse distributors selling to jobbers; at all events, the Commission should not find illegal discrimination inherent in such differences without a preliminary finding that the warehouse and the jobber do, in fact perform the same function.[4]

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[4] In past cases where the indirect purchaser doctrine has been employed by the Commission, it has not been used to compare prices at different levels of the distributional chain but only where discrimination exists between two or more "indirect purchasers" at the same level. In most of these cases (cited at p. 20, *supra*) a wholesaler bought from a supplier and then discriminated between two retailers to whom he resold. The Commission held that since the supplier was responsible for setting the prices of the wholesaler, he should be chargeable with the resulting price discrimination. See *K. S. Corp.* v.

Not only does the Commission's holding here thus seem unsupportable in theory, but we believe that it would have unfortunate economic consequences. Specifically, the Commission's approach would largely impede the achievement of economies through vertical integration of the steps of the distribution process, where competitive and economic factors might otherwise lead to such integration. In many industries supplies will be distributed more efficiently and economically by an integrated warehouse and jobber than by two separate independent entities. The integrated warehouse-distributor-jobbers in this case are

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Chemstrand Corp., 198 F. Supp. 310 (S.D. N.Y.); *Dentists' Supply Co.*, 37 FTC 345; *Kraft-Phenix Cheese Corp.*, 25 FTC 537. Indeed, in *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (C.A. 2), certiorari denied, 371 U.S. 824, a supplier directly paid rebates to some customers of his wholesalers, but not to others. A second group of cases involved a refusal to supply certain services to all customers. Respondents in those cases sold directly to some retailers and also sold to wholesalers who resold to retailers. They supplied demonstration and other services to some retailers but not to others. The Commission required them to make their services available to all retailers on equivalent terms. See *Elizabeth Arden, Inc., et al.*, 39 FTC 288, affirmed, 156 F. 2d 132 (C.A. 2); *Luxor Ltd.*, 31 FTC 658.

The court in *American News Company* suggested another situation in which the "indirect purchaser" doctrine might be appropriately applied. A supplier may wish to discriminate between two customers. Knowing that such discrimination is illegal, he may create a "dummy" wholesaler, the sole function of which is to buy the supplier's product at the price charged the "favored" customer and resell it to the "disfavored" customer at a higher price. This patent evasion of the statute would seem to justify finding that the "dummy" wholesaler performs no real function. The Commission has not suggested that such a sham middleman is present in this case.

probably an illustration of just such economies; here, for example, the mark-up taken by an integrated entity which buys from Purolator and sells to dealers is 18.6 cents (55 cents minus 36.4 cents—see ¶2, *supra*, p. 6), while total mark-up between Purolator and the dealer when filters pass through an independent warehouse and an independent jobber is 23 cents (55 cents minus 32 cents—see ¶1, *supra*, pp. 4–5). A somewhat different form of potentially economical vertical integration is illustrated by *Alhambra Motor Parts*, F.T.C Docket No. 6889 (Dec. 17, 1965), where groups of independent jobbers formed cooperative warehouses in an attempt to compete with the standard distribution chain requiring separate warehouses and jobbers. Where such integration produces significant economies, it should spur competition by forcing the competitors of the integrated entity to look for more efficient methods of distribution. Such savings in the cost of distribution should ultimately be passed on to the consumer in the form of lower prices.

To require a supplier such as Purolator to charge an integrated warehouse-distributor-jobber—or an integrated cooperative—the same price as is charged to an independent jobber who performs no warehousing function would make such integration—and the resulting competition—impossible, for it would give the integrated entity no credit for performing two functions and it would force it to compete with jobbers who pay the same price but perform substantially fewer tasks in the distribution process. To use the

figures in this case as illustrations, the Commission's rule would require integrated entities to pay 40 cents for filters sold to dealers—the same price independent jobbers pay. Both would thus be permitted mark-ups of 15 cents in selling to dealers at 55 cents. Yet the integrated entity's mark-up must cover the cost of warehousing, which the jobber's mark-up does not cover. Indeed, the jobbers buy from a warehouse with an 8-cent mark-up (the warehouse pays Purolator 32 cents) specifically covering warehousing.

In sum, the United States believes that the Robinson-Patman Act was intended to assure only that "businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned" (emphasis added). *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 520. The Act plainly did not intend to require uniformity of price among purchasers operating at different functional levels, particularly where such uniformity may, as we suggest, significantly impede economies by protecting existing—and possibly antiquated—distribution systems from the normal pressures of competition and distributional innovation. Cf. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74. The importance of the issues is, in addition, emphasized by the fact that, in a series of recent cases, the Commission has used the same approach as it used in this case to reach similar results. See *National Parts Warehouse*, F.T.C. Docket No. 8039 (decided December 16, 1963), CCH Trade Reg. Rep. (1963–1965

Transfer Binder), para. 16700, at 21624–26, affirmed *sub nom. General Auto Supplies, Inc.* v. *Federal Trade Commission*, 346 F. 2d 311 (C.A. 7), petition for certiorari dismissed pursuant to Rule 60, 382 U.S. 923; *Monroe Auto Equipment Co.*, F.T.C. Docket No. 8543 (decided July 28, 1964), CCH Trade Reg. Rep. (1963–1965 Transfer Binder), para. 17011, at 22122–13, affirmed *sub nom. Monroe Auto Equipment Co.* v. *Federal Trade Commission*, 347 F. 2d 401 (C.A. 7), certiorari denied, 382 U.S. 1009; *Alhambra Motor Parts*, F.T.C. Docket No. 6889 (decided December 17, 1965). The validity of this approach should, we believe, be passed upon by the Court at this time.[5]

[5] The dangers of the Commission's *prima facie* rule would not be mitigated even if the Commission permitted a manufacturer such as Purolator to rebut the *prima facie* case against it by showing that its price differential to integrated entities—as compared with its price to independent jobbers—is no greater than the cost of performing the warehousing function. In the first place, the Commission has never suggested that such a defense is available. Secondly, the burden of showing costs in a Robinson-Patman Act proceeding is enormous; the Commission is not often content with accounting estimates; elaborate cost studies are required; and ordinary business records are rarely sufficient. See *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 68. Moreover, since the warehouse distributors are independent of the manufacturer, the burden would be especially difficult to meet since the data necessary to show warehousing costs ordinarily is not in the hands of the manufacturer. While it may be reasonable to require a supplier to present evidence of his own costs when he argues that a price differential he imposes is cost justified under Section 2(b) of the Act, it is far less justifiable to make him present evidence of the costs of an independent business-

CONCLUSION

For the above reasons, we respectfully submit that the Court should grant the petition for certiorari to consider questions I, III and IV of the petition which, we believe, may appropriately be restated as follows:

"Whether a supplier who charges his direct purchasers prices different from those charged indirect purchasers at a lower functional level of distribution is in violation of Section 2(a) of the Robinson-Patman Act."

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man when he charges the same price to all purchasers at the same level of distribution.

Moreover, we see no reason why an integrated entity performing both warehousing and jobbing functions is not entitled, not merely to a deduction from the jobber's price which is equal to warehousing costs, but to buy at the same price as an independent entity which performs equivalent warehousing functions and which sells to jobbers. Where, as in this case, independent warehouses buy from Purolator at 32 cents and resell to jobbers at 40 cents, no discrimination favoring integrated warehouse-distributor-jobbers would seem to inhere in a pricing system which also permits such entities to purchase from Purolator at 32 cents, regardless of whether the independent warehouses' 8-cent mark-up exceeds the costs of warehousing. The presence of an integrated competitor who is free to buy at the same price as an independent warehouse may ultimately be expected to provide competition which will compel the reduction of any unreasonably high mark-up which independent warehouses now enjoy. The Commission's approach, on the other hand, protects any existing excessive mark-ups by independent warehouses in sales to independent jobbers by making it impossible for the jobbers to avoid the mark-up by achieving integration with a warehouse distributor.

If the Court grants the petition, the Solicitor General will authorize the Commission to defend its order, and will file a brief *amicus curiae* setting forth in greater detail the views of the United States.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
PAUL BENDER,
Assistant to the Solicitor General.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

SUPREME COURT, U. S.

AUG 6 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

PUROLATOR PRODUCTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF FOR PUROLATOR PRODUCTS, INC. ON PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF FOR PUROLATOR PRODUCTS, INC. ON PETITION FOR A WRIT OF CERTIORARI

Petitioner, PUROLATOR PRODUCTS, INC. ("Purolator") joins the Solicitor General in urging the Court to review the issues described in his Amicus Curiae Memorandum.* However, Purolator wishes to comment on one portion of the Federal Trade Commission's Brief in Opposition.

Question 6 of the questions presented in the Petition is, in substance, whether Purolator under § 2(a) may cost justify the price difference between its WDs and so-called "indirect" jobber purchasers from such WDs on the basis of the cost Purolator incurred in paying its WDs for acting as Purolator's agents in distributing filters to such "indirect" jobber purchasers.

On page 21 of the Brief of the Federal Trade Commission in Opposition, Commission Counsel claim that Purolator in this Court has deviated from the argument it made

* In so doing, however, Purolator does not abandon its position that the Court should review all of the issues stated in the Petition for Certiorari, including that set forth in petitioner's Motion for Leave to Amend the Petition.

below, in that it now contends that warehouse distributors are its "agents" in reselling filters to jobbers, and that the 6¢ internal redistribution discount to such warehouse distributors is in fact a "commission" paid to its "agents". We fail to perceive any deviation from the argument made below. (See, for example, Petitioner's Reply Brief in the Court of Appeals, p. 6.) It was the Commission which, in its "majority" opinion, characterized the warehouse distributor as an "agent". The Commission's precise language is quoted on page 21 of Purolator's Petition.

The position of Commission Counsel appears to be that for purposes of invoking the indirect purchaser theory, warehouse distributors are agents of Purolator but that for purposes of rejecting Purolator's cost justification defense, warehouse distributors are not agents at all but purchasers of Purolator.

Purolator respectfully submits that this Court should grant certiorari on this issue, if only so the bench, bar and automotive parts industry will know what the law is in this area.

Respectfully submitted,

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Sumner S. Kittelle, Esq.

ALLAN TRUMBULL

Allan Trumbull, Esq.
Counsel for Petitioner

August 5, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

In its brief in opposition, the Commission opposed petitioner's motion to amend the petition for certiorari to include the additional question whether the Commission's decision was invalid because less than a majority of the full Commission concurred therein (n. 9, p. 22). (Only three Commissioners participated in the decision, and the panel divided two-to-one.) The Commission pointed out (*id.* p. 23) that petitioner relied primarily on the conflict between

Flotill Products, Inc. v. *Federal Trade Commission*, 358 F. 2d 224 (holding that a decision concurred in by only two of the three participating Commissioners was invalid) and *Atlantic Refining Company* v. *Federal Trade Commission*, 344 F. 2d 599, 607 (C.A. 6), certiorari denied, 382 U.S. 939 (reaching a contrary conclusion); and that the Ninth Circuit had granted the Commission's petition for rehearing *en banc* in the *Flotill* case.

On August 15 the Ninth Circuit, in a five-to-four decision, adhered to its prior ruling in *Flotill*. A copy of the court's order is attached. Thus, there is now a direct conflict between the Sixth and Ninth Circuits.

The Solicitor General has decided to file a petition for a writ of certiorari in *Flotill*, and expects to do so shortly.

Since the question whether the Commission's order was invalid because a majority of its members had not concurred therein may involve the jurisdiction of the Commission, it would appear appropriate for the Court to consider the issue even though the petitioner did not raise the point in the court of appeals. In the circumstances, and in view of the direct conflict between the circuits and the fact that the Commission will file a petition in *Flotill*, the government does not oppose the motion to amend the petition. The Commission continues to oppose the petition on its merits for the reasons given in its brief in opposition; and the United States believes that the petition should be granted, to the extent and for the reasons set forth in its memorandum *amicus curiae*.

If the Court grants the petition on the substantive issues, it should also grant review on the jurisdictional question. If it decides to deny review on the substantive issues, however, it would seem appropriate to defer action on the jurisdictional question pending determination of the petition to be filed in *Flotill.*

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

SEPTEMBER 1966.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,521

Filed Aug. 15, 1966, Wm. B. Luck, Clerk

FLOTILL PRODUCTS, INC., ET AL., PETITIONERS,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review and Set Aside an Order of the Federal Trade Commission

Before: CHAMBERS, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING, DUNIWAY and ELY, Circuit Judges.

ORDER

Per curiam:

The court en banc takes the case solely for the purpose of deciding "When is a majority a majority?".

The opinion of Judge Barnes is amended as follows: To the second paragraph on page 229 of 358 F.2d, after 49 U.S.C. § 17(1), is added: "Federal Power Commission, 16 U.S.C. § 792." In the third paragraph on page 229, the last sentence thereof is stricken, and substituted therefor is the following: "On the other hand, it is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation."

Judges Chambers, Jertberg, Koelsch and Duniway concur in the opinion of Judge Barnes as so modified.

Judges Merrill, Browning and Ely concur with Judge Hamley in his dissent.

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